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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

RALPH PALIKAPU O KAMOHOALI'I DEDMAN and DR. NOA EMMETT AUWAE ALULI,

Petitioners,

vs.

HAWAII BOARD OF LAND AND NATURAL RESOURCES, ESTATE OF JAMES CAMPBELL and TRUE/MID-PACIFIC GEOTHERMAL VENTURES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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QUESTION PRESENTED

Petitioners Ralph Palikapu O Kamohoali'i Dedman and Dr. Noa Emmett Auwae Aluli are Native Hawaiians who practice the Pele religion. Pele is an ancient goddess in Hawaiian religious mythology. Petitioners and many other Native Hawaiians believe the goddess is alive today, creating new land on the Island of Hawaii, and that the area comprising the active Kilauea Volcano on that island is the physical manifestation of Pele. Petitioners believe the proposed private development of State owned geothermal resources on the Island of Hawaii will destroy Pele by tapping into her body and blood, and by destroying land which is the sine qua non of Pele religious practice.

Does the "honest conviction" of Native Hawaiian Pele worshipers that essential religious beliefs and practices are infringed by geothermal development satisfy the "burden" prong of the First Amendment free exercise test so that the legal burden shifts to the State of Hawaii to prove a compelling need to develop the geothermal resource?

PARTIES TO THE PROCEEDING

Petitioners Ralph Palikapu O Kamohoali'i Dedman and Dr. Noa Emmett Auwae Aluli are individual Native Hawaiians from the Islands of Hawaii and Molokai, State of Hawaii, respectively. Respondents are the State of Hawaii Board of Land and Natural Resources, The Estate of James Campbell and True/Mid-Pacific Geothermal Ventures.

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OTHER AUTHORITIES PAGE(S)

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioners Ralph Palikapu O Kamohoali'i Dedman and Dr. Noa Emmett Auwae Aluli respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Hawaii in Ralph Palikapu

O Kamohoali'i Dedman & Dr. Noa Emmett Auwae Aluli v. Hawaii Board of Land & Natural Resources, No. 11334, entered on July 14, 1987.

OPINIONS BELOW

The opinion of the Hawaii Supreme Court is reported as Dedman v. Hawaii Board of Land & Natural Resources, 740 P.2d 28 (Haw. 1987), and is attached to this petition as Appendix A. Relevant portions of the Hawaii Board of Land and Natural Resource's Findings of Fact and Conclusions of Law are attached to this Petition as Appendix B.

JURISDICTION

The opinion of the Hawaii Supreme Court was dated and filed on July 14, 1987. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Hawaii Supreme Court's judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1257(3). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rules 20 and 29.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[1/]

[1/] In 1940 the Supreme Court applied the First Amendment to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940).

Article I, Section 4 of the Hawaii Constitution provides in pertinent part: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

STATEMENT OF THE CASE

Nature Of The Case

This case presents the substantial question of the scope of rights of Native Hawaiian religious practitioners under the free exercise clause of the first amendment to the United States Constitution. Specifically, is sacred geography which is the sine qua non of Hawaiian religious beliefs and practices entitled to protection from the coercive effect of private development of State owned geothermal resources on the Island of Hawaii?

Petitioners Ralph Palikapu O'Kamoholi'i Dedman and Dr. Noa Emmett Auwae Aluli are Native Hawaiian religious practitioners who acknowledge and worship the presence and power of the Hawaiian goddess Pele. Pele religious doctrine, like the doctrine of Native American religions on the mainland, centers on

perpetuating a set of sacred rituals and ceremonies conducted in accordance with the instructions handed down by oral tradition from generation to generation. Each ceremony or ritual derives from a specific prophecy received from Pele in a sacred place determined by her, and must be performed in the manner directed by her. Maintaining the physical integrity of sacred geography to enable Native Hawaiian religious practitioners to preserve the essential harmony with Pele is therefore a critical attribute of the religion.

In this sense Pele religion differs fundamentally from other world religions, such as the major Judeo-Christian religions. These religions are considered as commemorative in nature, commemorating a sacred event or the reenactment of the original revelation by a major religious figure. As such, they

do not emphasize the protection of sacred geography as an essential attribute of religious doctrine or daily religious practice.

The decision of the Hawaii Board of Land and Natural Resources, to permit the private exploration and development of geothermal energy in the Kilauea Middle East Rift Zone ("KMERZ") on the Island of Hawaii, conflicts with Pele religious doctrine and practice. The decision allows disturbance of the physical integrity of a large land area important to religious practice and taps the very life blood of the goddess Pele.

Statement Of Facts

On March 2, 1982, the Estate of James Campbell[1/] filed a Conservation District

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[1/]The Estate of James Campbell is a private estate which owns large tracts of land on the Island of Hawaii. Together with True/Mid Pacific (Cont. on next page)

Use Application ("CDUA") with the Hawaii Board of Land and Natural Resources ("BLNR") to develop geothermal resources at Kahauale'a, Puna, Hawaii. This application was processed and a draft Environmental Impact Statement ("EIS") prepared. Administrative hearings on the application were convened by the BLNR in the fall of 1982. Pet. App. 8, 42-3. The BLNR issued findings of fact, conclusions of law, and a decision and order on February 25, 1983, granting Campbell limited exploration rights within an 800 acre area located at Kahauale'a. Pet. App. 8-9, 43.

In 1983, the Hawaii State Legislature passed Act 296, now codified in HRS §205-5.1 and 5.2, delegating to the BLNR

1/(Cont.) Geothermal Ventures, a private geothermal company from Wyoming, Campbell intends to develop the Island of Hawaii geothermal resources.

the responsibility of designating geothermal resource subzones ("GRS") throughout the State of Hawaii by selecting those areas that demonstrate an acceptable balance among seven criteria. Pet. App. 43-4. Act 151, passed in 1984, gave first priority to the assessment of the Kahauale'a area as a potential geothermal resource subzone and required the BLNR to act on the designation of the Kahauale'a area by December 31, 1984. The Division of Water and Land Development ("DOWALD") of BLNR assessed the Kahauale'a area and proposed a 5300-acre area for designation as a GRS. Pet. App. 9, 44-5.

The BLNR held public information meetings and public hearings as part of the subzone designation process for the proposed Kahauale'a GRS. Pet. App. 45. The BLNR subsequently granted these

requests, conducted administrative hearings on December 12-20, 1984 and issued its decision and order on December 28, 1984. Pet. App. 9-10, 45. In its decision and order, the BLNR designated the 800-acre area, described in its February 25, 1983 decision and order, as a geothermal resource subzone, under certain conditions, including the cessation of volcanic activity in, around, and near the area. Pet. App. 45-49. The BLNR requested that Campbell investigate and consider a land exchange involving State-owned lands in the Kilauea Middle East Rift Zone ("KMERZ") and Campbell's lands at Kahauale'a. Pet. App. 10. The BLNR further decided to consider the KMERZ for designation as a GRS. Pet. App. 11, 49-50. This area had not previously been evaluated as a GRS because of its classification as the Wao

Kele O Puna Natural Area Reserve.[2/]

On August 20, 1985 Campbell filed a CDUA to explore for and develop geothermal energy within the proposed KMERZ/GRS.[3/] The BLNR held a public

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[2/]The Board directed DOWALD to assess the KMERZ in and Adjacent to the Natural Area Reserve beginning on the western boundary of the existing Kamaili GRS. DOWALD conducted its assessment of the KMERZ and subsequently recommended that approximately 11,745 acres of the KMERZ be designated as a GRS. Pet. App. 50.

[3/]The KMERZ/GRS contains approximately 9,014 acres, more or less. Of that area, between 244-304 acres may potentially be used for this project. Of this total, an estimated 244 acres will be directly affected by clearing and/or construction. The KMERZ/GRS is designated as conservation District in the State Land Use classification and is classified as a Protective ("P") Subzone of the Conservation District. This former natural area reserve is currently in its natural state and is mostly forested. The vegetation ranges from high quality native vegetation (wet 'ohi'a forest with dense 80% canopy), to lower quality vegetation and open areas of lava flows in and below the rift zone.

hearing on the proposed designation of the KMERZ as a geothermal resource subzone on September 26, 1985. Pet. App. 11, 49-50. On November 13, 14, and 15, 1985, BLNR conducted administrative hearings on the proposed geothermal resource subzone designation. Pet. App. 11, 49-50. On December 20, 1985, the Board issued a decision and order designating approximately 9,014 acres of the Wao Kele 'O Puna area as a GRS. Pet. App. 11, 50. On December 27, 1985, the Estate of James Campbell and the State of Hawaii executed exchange deeds for Kahauale'a and the Puna Forest Reserve, including the Wao Kele 'O Puna Natural Area Reserve. Pet. App. 11-12. On April 9, 1986, the Board issued its finding of fact, conclusions of law and amended decision and order on the GRS designation. Pet. App. 11, 50.

On December 20, 1985 the BLNR announced that a public hearing on the KMERZ/CDUA would be held. On January 3, 1986 BLNR issued a notice to Campbell accepting the application. Pet. App. 12. The public hearing on the CDUA was held on January 13, 1986. On January 21, 1986, the BLNR announced that administrative hearings would be held on the CDUA. Pet. App. 12.

The BLNR held administrative hearings on Campbell's CDUA on February 18-23, 1986 and on March 14, 1986. Pet. App. 12. Petitioners requested and were granted intervenor status in these hearings. Petitioners Dedman and Aluli testified at the hearings, as well as several other Pele religious practitioners: Pualani Kanahele, Edward Kanahele, and Hannah Kihalani Springer. As to the nature of Pele religion and the

role of the Volcano area in Pele religious belief and practice these witnesses testified to the following uncontroverted facts:

(1) The KMERZ and adjacent areas are the literal home and body of the goddess Pele;

(2) Pele's home and body are sacred;

(3) The Kilauea volcanic area, including the KMERZ, is the source of spiritual power for Pele practitioners, which power is <u>essential</u> for all Pele religious ceremonies and in the daily lives of people who practice the Pele religion;

(4) Individual practitioners, when told to do so, go into the Volcano area to conduct certain specific, private rituals and ceremonies;

(5) Plants, trees, and certain volcanic land forms in the KMERZ and adjoining areas are the sacred embodiment of Pele and medium through which she communicates;

(6) Pele is the magma, the heat, the vapor, the steam and the cosmic creation which occur in volcanic eruptions. She is seen by Pele people in the lava, images of her standing erect, dancing, and

extending her arms with her hair flowing into the steam and clouds.

(7) The kumu hula play an integral role in the Pele religion, translating messages from Pele and communicating them to others in the form of chants and dances. Their "power" is received at sites in the KMERZ and adjacent areas invested with the same spiritual embodiment of Pele.

(8) The literal interpretation of a message from Pele is a prophecy concerning geothermal development:

. . . Come to see my display, to see the movements that I do. To view my inner parts and how I dance and how I move. But you are not welcome to take what is mine. Whatever is hot here is mine. Whatever is hot here is sacred. . . .

See Hawaii Supreme Court Record.[4/]

[4/]Petitioners' interpret Rule 19.1 of the Supreme Court Rules to allow, for purposes of seeking a writ of certiorari, citations to the lower court's record. See Stern & Gressman, Supreme Court Practice 329-33 (6th ed. 1986). Reproduction in the Appendix of the portions of the record to which Petitioners refer would be voluminous. (Cont. on next page)

On March 21, 1986, the parties filed their proposed Findings of Fact, Conclusions of Law, and Decisions and Order. The BLNR issued its Decision and Order granting Campbell's CDUA on April 11, 1986. Pet. App. 12. However, it was not until June 18, 1986 that the BLNR filed its Findings of Fact and

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4/(Cont.) Citations to the record for the above statements include: (1) Oral testimony of Dr. Aluli, G.S. No. 9/26/85-5, TR. Vol. VI, p. 10, 12-13; Oral Testimony of Pualani Kanahele, CDUA No. HA-12/20/85-1830, TR. Vol. VIII, pp. 115, 127-129. (Appellants'proposed findings of fact Nos. 7, 11); (2) Id.; (3) Intervenors' Ex. 2, Prehearing Statements, G.S. No. 9/26/85-5; (4) Id.; (5) Intervenors' Exh. 2, G.S. No. 9/26/85-5. (Appellants' proposed findings of fact No. 16); (6) Ex. 1, Attachment to Intervenors' Joint Testimony, CDUA No. HA-12/20/85-1830; Oral Testimony of Dr. Aluli, G.S. No. 9/26/85-5, TR. Vol. VI, pp. 10-11; Oral Testimony of Pualani Kanahele, CDUA No. 12/20/85-1830, TR. Vol. VIII, p. 127; (7) Id., p. 126; and (8) Oral Testimony of Pualani Kanahele, CDUA No. HA-12-20-85-1830, TR. Vol. VIII, pp. 108-123.

Conclusions of Law with its earlier Decision and Order attached. Pet. App. 13. The Board incorporated by reference all of the record in the previous proceedings related to Campbell's geothermal development applications and GRS designations.

Under this decision, BLNR granted Campbell permission to initially explore, develop, and produce up to 25 megawatts ("MW") of geothermal energy and to explore for an additional 75 MW of geothermal energy. Pet. App. 13. On July 17, 1986 Petitioners filed a timely notice of appeal of the BLNR's decision to the Hawaii Supreme Court. On July 14, 1987 the Hawaii Supreme Court affirmed the BLNR decision.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS IMPORTANT SIMILAR ISSUES ALREADY PENDING BEFORE THE COURT

On May 14, 1987, the Court granted the United States' petition for a writ of certiorari to the Ninth Circuit Court of Appeals in Lyng, et al. v. Northwest Indian Cemetery Protective Association, et al., No. 86-1013 (October Term, 1987). Lyng will be fully briefed, argued and decided this term. From a general perspective Lyng raises the question of the extent to which the federal government's land management activities infringing on geographic areas sacred to Indian religion and religious practitioners are circumscribed by the free exercise clause of the first amendment to the Constitution.

In relation to religious free

exercise rights the federal government advances two essential arguments in Lyng. First, that federal land management activities on public lands as a matter of law do not impermissibly "burden" Indian religion. Second, that a government agency's land management decisions are entitled to substantial deference and should be subjected to a test of "reasonableness" rather than the traditional compelling state interest test. Lyng, Brief On The Merits For The United States Government, pp. 20-36, 37-43.

The case at bar raises these same issues. The State of Hawaii reserved ownership of the geothermal resources in lands exchanged with the Campbell Estate, so this case deals with government property to the same degree as in Lyng. See Pet. App. 11-12. And in both cases

government action is being challenged as burdensome on Native religion: the construction, maintenance and use of a road and related activities by the United States Forest Service in Lyng; here the State of Hawaii's permitting of exploration and development of publicly owned geothermal resources.

The Hawaii Supreme Court's ruling on the burden prong of the free exercise test essentially tracks the argument made in briefs by the federal government on that issue in Lyng. Both argue that there is no "direct" burden to Native religion because government has not enacted a law or regulation expressly proscribing religious belief or practice. Both also argue that "indirect" burden only occurs if a law or regulation either by threat of sanction or conditioning of receipt of a benefit causes someone to

modify his or her behavior or violate religious beliefs. Compare Pet. App. 18-20 with Lyng, Gov. Br. pp. 20-35. See discussion p. 25-28, infra.

Unlike Lyng, the Hawaii Supreme Court did not reach the "balancing prong" of the free exercise analysis because it found no burden on Pele religion. Thus the court did not reach the question of whether there exists a "compelling" need in Hawaii to develop geothermal energy. That issue would be resurrected, however, if the Court here and in Lyng adopts the method for applying the burden prong in Native religion cases set forth herein by Petitioners. Thus the Court's resolution of the matter has important implications if certiorari is granted and this case is set for argument or alternatively remanded in light of the decision in Lyng. See Stern and Gressman, Supreme

Court Practice 221, 274 (6th Ed. 1986); Keney v. New York, 388 U.S. 440 (1967) (per curiam), reversed in light of decision in Redrup v. New York, 386 U.S. 767 (1967). Petitioners strongly believe certiorari should be granted because of the legal parallels between this case and Lyng.

II.

THE DECISION OF THE HAWAII SUPREME COURT ON A SUBSTANTIAL FEDERAL QUESTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A. The Hawaii Supreme Court raised two independent grounds for its conclusion that permitting geothermal development on the Island of Hawaii did not impermissibly burden the constitutional free exercise rights of Pele religious practitioners. The court found evidence that Native Hawaiians sincerely believed geothermal development would desecrate the body of Pele, destroy Pele by robbing her of

vital heat, interfere with ritual practices, and disable practitioners from training young Hawaiians. The court held, however, that this evidence did not demonstrate either direct or indirect infringement sufficient to shift the legal burden to the State to prove the compelling need to develop geothermal energy. In the court's terms, for infringement to occur the state law approving geothermal development must either "regulate or directly burden. . . religious beliefs. . ." or "compel them, by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds." Pet. App. 19-20 (citations omitted).

This first ground for rejecting Petitioners' religious claims is premised on a fundamentally narrow, imprecise

reading of Supreme Court free exercise precedent. In this case Petitioners can identify no laws or regulations promulgated by the Hawaiian government which on their face infringe on Native Hawaiian Pele religion. But, this Court has expressly recognized that government laws and regulations are constitutionally invalid if their primary effect is to impermissibly infringe religion. Sherbert v. Verner, 374 U.S. 398 (1963);[5/] Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981);[6/] accord, Hobbie v. Unemployment

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5/"[I]f the purpose or effect of a law is to impede the observance of one or all religions. . . , that law is constitutionally invalid even though the burden may be characterized as being only indirect." Sherbert, 374 U.S. at 404 (emphasis added).

6/"In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the (Cont. on next page)

Appeals Commission of Florida, 480 U.S. ____, 94 L.Ed.2d 190, 197 (1987), quoting Thomas and Sherbert. Petitioners' submit that in the case at bar the primary effect of the State's geothermal development laws is to impermissibly burden the Pele religion.

This Court has never expressly limited free exercise protection, as did the Hawaii Supreme Court, to circumstances where the indirect burden of government activity occurs by "threat of sanctions" which forces practitioners to "refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds." Pet. App. 19-20.

6/(Cont.) governmental constitutional requirement for neutrality if it unduly burdens the free exercise of religion." Thomas, 450 U.S. at 717, citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972), and Walz v. Tax Commission, 397 U.S. 664 (1970).

To be sure, cases of indirect government infringement considered by the Court usually involve some threat of sanction or condition upon the receipt of a public benefit that require the compromise of religious faith. However, as Justice O'Connor recently noted, this is attributable more to the nature of our complex society than other identifiable factors.7/

Petitioner's religious claims should not be rejected simply because they do not arise in a context more familiar to

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7/"Even if the Founding Fathers did not live in a society with the 'broad range of benefits [and] complex programs' that the Federal Government administers today, . . ., they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state was not the fall of the Free Exercise Clause. Bowen v. Roy, 476 U.S. ____, 90 L.Ed.2d 735, 765 (1986).

this Court. The distinguishing factor here is that Hawaiian religious beliefs and the practices associated with them fundamentally differ from mainstream Judeo-Christian religions. As a result the nature of government burden which produces infringement necessarily differs from usual cases. Accordingly, the burden prong of the free exercise test must be interpreted and applied in such a way as to fairly evaluate Petitioners' claims; this should not be an invitation to "grant the Government license to apply a different version of the Constitution. . . ." Bowen, id.

By focusing on the primary effect of government action, Court decisions in the free exercise area provide the latitude to do just that. In Thomas for instance, the Court has said that when government activity puts "substantial pressure on an

adherent to modify his behavior and to violate his beliefs, a burden on religion exists." Thomas, 450 U.S. at 718, quoted in Hobbie, supra, 94 L.Ed.2d at 197.

In this case there exists such pressure to modify behavior and to violate beliefs. The Native Hawaiian religious beliefs center on the goddess Pele, a living nature deity. Pele is the very center of the religion, the focus of all religious belief and practice. The recent formation of new land on the Island of Hawaii as a result of eruptions by the Kilauea Volcano adjacent to the area to be developed for geothermal energy are indeed a testament to her creative, life-giving forces.

Geothermal development would destroy Native Hawaiian practitioner access to and use of sacred land which is the sine

qua non[8/] of Pele religious practice, by turning a pristine, virgin rainforest into a spiderweb of pipelines, roads, geothermal wells and production plants. It would by accepted religious doctrine destroy the goddess Pele; and destroying

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8/"Physical access to the land and its natural products must also include the preservation of the natural conditions which are the sine qua non of that access. The efficacy of the natural products and the spiritual well-being of the sacred sites are dependent upon physical conditions. Changing of physical conditions - the spraying and logging of trees, unlimited trapping or removal of original species, alteration of the terrain through river channelization, dams and other methods - not only damages the spiritual nature of the land, but may also endanger the well-being of the Native religious practitioners in their role and religious obligation as guardians and preservers of the natural character of specific land areas." American Indian Religious Freedom Act Report, Federal Agencies Task Force at 54 (August 1979), prepared pursuant to Section 2, American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469, 470, 42 U.S.C. §1996.

her would effectively dismantle the religion. In this case Petitioners have shown sufficient evidence of religious burden to meet their obligation under the free exercise clause. Indeed, one would submit that greater burden has been shown here than that established in Sherbert, Thomas or Hobbie.[9/] In a very real sense, then, this is religious infringement or burden of the highest order.

Former Chief Justice Burger noted in Lynch v. Donnelly, 465 U.S. 668, 684 (1984): religious "[e]ntanglement is a question of kind and degree." In a

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9/Sherbert, Thomas and Hobbie all involve the Seventh-Day Adventist creed, and claims of importance of Saturday worship. None of the adherents in those cases ever raised as a matter of honest conviction the prospect that their religions would cease to function as a direct or indirect result of government coercion.

complex society such as ours minority groups often hold very different, seemingly eccentric religious doctrinal views. Religious accommodation through the Court's application of the free exercise test thus must also "vary in kind and degree" depending on the vagaries of religious doctrine and practice, to avoid the "hostility" and "callous indifference" consistently spurned by this Court. Id. at 673. Otherwise the admonition that the first amendment "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship", Wallace v. Jaffree, 472 U.S. 38, 50 (1985), quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), holds but an empty promise for practitioners of minority faiths. For if some fair accommodation is not made for the religious practices

of Native faiths the practitioners have no alternative but to accept some other form of religious doctrine for which the dominant society has demonstrated more tolerance.

B. The Hawaii Supreme Court's second ground for rejecting Petitioners' claim is equally unsound. The court reasoned that Petitioners failed to show a "substantial burden" on religion because in the court's view neither they nor other Pele witnesses proved that they ever used the area for religious rituals or ceremonies: it held the "mere assertion of harm to religious practices" was insufficient. Pet. App. 22.[10/]

[10/]The Hawaii Supreme Court also attempts to elevate claims of science above religious belief by reasoning that there "is no indication that tapping this heat source from the earth has diminished or negatively affected the eruptive nature of the Kilauea Volcano." Pet.
(Cont. on next page)

First, the court fundamentally misunderstood the nature of religious use of the area. There is evidence in the record of ritual, ceremonial use. But it is impossible for practitioners to identify the precise sites holding sacred value to Pele people. Kumu hula (hula teacher) Pualani Kanahele testified that individual practitioners, when directed by Pele to do so, go into the Volcano area to conduct private ceremonial rituals.[11] Petitioner Aluli testified that practitioners "can't pick and choose

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10/(Cont.) App. 21. But the very purpose of the free exercise clause is to protect sincerely held and deeply rooted religious beliefs from the whim and arrogance of those in positions of authority in government. See Watson v. Jones, 80 U.S. (13 Wall.) 679, 682 (1871); United States v. Ballard, 322 U.S. 78,86 (1944); United States v. Seeger, 380 U.S. 163, 184 (1965).

11/See Statement of Facts, p. 14, supra.

where Pele is or when people want or need or are told to practice their religion or to offer." A central, universal aspect of Native religion is that "men are not free to pick and choose the sacred site, that they only seek for it and find it by the help of mysterious signs." M. Eliade, The Sacred and The Profane: The Nature of Religion (Harper & Rowe, New York 1959) at 28 (emphasis original).[12/]

[12/] In this respect the error of the lower court's findings of fact concerning burden on religion is "obvious and exceptional." Stern & Gressman, supra at pp. 217-8. Despite evidence in the record supporting the conclusion of "obvious and exceptional showing of error", such a strict standard may not even apply here. The findings of the BLNR were by law subject to review directly by the Hawaii Supreme Court and not by a trial court or court of appeals. Under the circumstances a substantial evidence standard is more appropriate. Id. at 218. Petitioners believe granting a writ of certiorari is appropriate here not only to correct the erroneous factual findings but also to correct the legal analytical flaws in the lower court's analysis discussed supra and infra. See Stern & Gressman, id. at 217.

Second, the lower court's reasoning relies on a misreading of Yoder, Sherbert, Thomas and Hobbie, and charts a course which invites an ethnocentric treatment of Native claims which this Court should correct. As noted above, a religious adherent satisfies his burden under the first prong of the free exercise test when he demonstrates that the primary effect of a government action is to put "substantial pressure on [him] to modify his behavior and to violate his beliefs. . . " Thomas, supra, 450 U.S. at 718. The determination of whether an adherent in fact feels sufficient pressure to react in a manner inimical to religious belief, so as to constitute a constitutionally impermissible "burden", is a matter for which courts must rely on the adherents' own testimony. The Court made clear in Thomas: "The narrow function of a reviewing court in this

context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." Id. at 716 (emphasis added).[13/] In the case at bar, however, the Hawaii Supreme Court - while neither challenging their legitimacy or sincerity - ignored the honest convictions of the Pele religious practitioners. The uncontroverted evidence of Petitioners and other Pele practitioners established the role of the Volcano area and the

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13/The rationale for this approach is clear:

> Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 716.

importance of preserving its physical integrity. The court, however, chose instead to rely by negative implication on the absence of evidence of specific use of precise sites in the KMERZ to deny Petitioners' claims.

Petitioners' have maintained all along it was not their burden under the free exercise test to identify the precise location and use of ritual sites. The entire volcano area is sacred because of the various Pele manifestations identified above. As in Thomas, the court should have accepted the uncontroverted, "honest convictions" of Petitioners and other Pele religious practitioners as sufficient to meet their obligation under the burden prong. It was, in short, error for the Hawaii Supreme Court to rule that "mere assertions of harm" were insufficient.

The fundamental flaw in the court's analysis stems from a misreading of Sherbert and Yoder. Sherbert and Yoder do not examine the degree or severity of religious burden until the second, balancing prong of the free exercise test. These questions are not examined by the Court in the first phase of the test, where it is determined whether government action threatens to impose some impermissible burden on religion. By examining the degree of infringement on Pele religion as a precondition to shifting the legal burden to the State of Hawaii, the court unfairly tipped the free exercise scales against Petitioners' claims. Such an approach is foreign in Supreme Court free exercise precedent.

For instance, the Court in Sherbert did not as a precondition of establishing infringement require Adelle Sherbert to

establish the degree and severity of the burden. The Court accept as her "honest conviction" that a burden existed; South Carolina law was found to "impede the observance" of her religion. The Court did refer to Saturday worship as a "basic tenet of the Seventh-Day Adventist creed", but only in a footnote when assessing the strength of her claim and the degree of infringement. See Sherbert, supra, 374 U.S. at 399, n. 1.

And the Court in Yoder did not as a condition of establishing infringement require Jonas Yoder and Warren Miller to prove that Amish compliance with Wisconsin compulsory attendance laws would destroy the practice of essential elements of Amish religious doctrine. It found the effect of the law to be "severe" and "inescapable". But the lengthy discussion of the "fundamental

beliefs" of the Old Order Amish was directed to measuring the degree of burden. Yoder, supra, 406 U.S. at 210.

An assessment of the degree of religious infringement is necessary in free exercise analysis.[14/] But the point in the analysis at which that occurs is critical. It should not occur as a threshold inquiry to deny claims of the Native Hawaiian religious practitioners, but is more appropriately a mechanism for balancing the respective individual and governmental interests at

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14/The first step in the Sherbert free exercise analysis - proving that sincerely held beliefs, rooted in religion, are at stake - will take care of spurious or fraudulent claims. See, e.g., People v. Woody, 394 P.2d 813, 821 (Calif. 1964) (". . . courts of necessity must ask whether the claimant holds his belief honestly and in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities."), citing United States v. Ballard, 322 U.S. 78 (1944).

stake in a dispute such as that presented here.

Yoder may have invited its own misapplication. By inquiring into the "quality of the claims" presented by the Amish, 406 U.S. at 215, the Court opened up the possibility that lower courts might construe this as a threshold inquiry against which to mechanically compare the unorthodox beliefs and practices of other minority religions. This Court has long recognized the dangers inherent in allowing courts to pass judgment on whether an individual's religious claims are "central" enough or "fundamental" enough to shift the legal burden to the government to show a compelling interest sufficient to overcome such claims.

In Thomas, Chief Justice Burger cautioned against such an application of

Yoder. Indeed, in Thomas he began his analysis by citing Yoder and Sherbert as authority for the standard that beliefs and practices are to be protected if "rooted in religion." Thomas, supra, 450 U.S.at 713-4. Whether a practice satisfies that standard must not

> turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensive in order to merit First Amendment protection.

Id. at 714; cf. United States v. Lee, 455 U.S. 252, 257 (1982).[15/] One commentator

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15/"No doubt the courts may properly question a defendant's honesty, sincerity and good faith; it would seem, however, that once a practice is deemed to be religious, questions regarding what is "essential" as opposed to "important", what is "indispensable" as opposed to "desirable" in a religion, is better left to theologians." Marcus, The Form of Conscience: Applying Standards Under The Free Exercise Clause, 1973 Duke L.J. 1217, 1250-51.

has concluded that the Court agreed to hear Thomas precisely to clarify that Yoder is not to be applied restrictively, and to caution against judicial inquiry into the nature or validity of religious belief.[16/]

Such an approach does not unfairly tip the scales in favor of Native religious claims to sacred land. But on the other hand it does not allow courts, otherwise unfamiliar with the vagaries of Native religion or predisposed to yield to the arrogance of perceived governmental needs, to avoid a fair balance of the respective interests at stake. Rejecting such "covert balancing" may change the outcome of some Native free exercise cases involving sacred geography.

16/Pepper, The Conundrum of the Free Exercise Clause - Some Reflections On Recent Cases, 9 N.Ky.L.Rev. 265, 285 (1982).

In terms of this case, then, to determine whether the burden prong was met the Hawaii Supreme Court should have focused exclusively on the specific nature of Pele religious doctrine and practice. As set out earlier, an essential attribute of Native religion is the need to maintain harmony with spiritual deities through the protection of sacred geography. In many instances that sacred geography is the location of many important ritualistic practices. Here the entire KMERZ area has religious significance because of the manifestation of Pele in various forms - volcanic eruptions, lava, steam, vapor, etc. - in the area.[17/] Moreover, the

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17/"Pele is the magma, the heat, the vapor, the steam and the cosmic creation which occur in volcanic eruptions. She is seen in the lava, images of her standing erect, dancing and extending her arms with her hair flowing into the steam and clouds." See pp. 14-15, supra.

entire Kilauea Volcano area represents the very body of Pele, a living goddess.[18/]

18/Pualani Kanahele demonstrated a hula to the Board of Land and Natural Resources which as translated described the essence of Pele's life connection to the KMERZ:

> This last chant is a mele ma'i for Pele. And Mele ma'i tells about the different parts of her body. As is appropriate for all hula performances, you should close the performance with a mele ma'i. This particular mele ma'i tells about Pele and her different parts. And especially describes hale ma'u ma'u and in that song, E komo mai oloko hale ma'u ma'u, come into hale ma'u ma'u, come into hale ma'u ma'u, you're welcome. Come to see my display and how I dance and how I move. But you are not welcome to take what is mine. Whatever is hot here is mine. Whatever is hot here is acted. Her back is hot, as I said earlier, and so her back is sacred. But it's [not] only her back that we're talking about, the literal back, it's that whole part of the land that is hot, that is sacred.

See p. 15, supra.

In short, the correct focus from Yoder, Sherbert and Thomas in Native religion cases should be on the function of sacred geography in religious doctrine and practice, and the affect on that practice when the physical integrity of the area is threatened by some government activity. To gauge this courts must accept the "honest convictions" of religious adherents, not reject them as "mere assertions." The extent of actual use of a physical area may be relevant to a court's inquiry, but not until examining the degree of burden when balancing respective government and religious interests.

The Hawaii Supreme Court's decision here reflects the continuing tendency of lower courts in Native sacred site cases to engage in improper "covert" balancing in the burden prong of the free exercise

test.[19] In other words, courts unfairly elevate the threshold in the burden prong to a level Native religious practitioners, in most instances, cannot meet.[20] This Court has an opportunity to correct that flaw both here and in Lyng.

Under the above approach advocated by Petitioners, they have met the "coercive effect" test as articulated by Sherbert and Yoder. Because of the nature of Pele religion and the role of the entire Kilauea Volcano area in Pele religious

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19/This same analytical flaw is present in cases such as Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); Wilson v. Block, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).

20/The decision of the Ninth Circuit Court of Appeals in Lyng is one instance where, despite reliance on the analytically flawed test, the Indian litigants demonstrated an impermissible burden on religious practice.

doctrine and practice, the proposed geothermal development would be definition have a coercive effect: it would "impede the observance" in Sherbert terms; its effect in Yoder terms would be "severe" and "inescapable."

The degree of infringement on Pele religion, as measured by the degree of centrality or importance of the Volcano area to Pele religion, is more legitimately the court's focus in the "balance" prong of the free exercise test. For obvious reasons, degree of infringement is relevant at that stage.[21/]

21/Marginally important religious practices may not require protection irrespective of the degree of importance of a government interest, but the more important the religious interest - especially in cases of minority faiths - the greater the need for a court to find a compelling government interest justifying infringement. See, generally, Pepper, Taking The Free Exercise Clause Seriously, 1986 B.Y.U.L.Rev. 299, 308-316.

By employing a closer examination of a religion and the expected degree of infringement as a balance against government interest, and not as a subjective threshold device, courts are then put in a position of having to more fairly evaluate the respective claims. This is the approach favored, indeed compelled, by Yoder, Sherbert and Thomas. The alternative approach invites the ethnocentric, subjective whim of the court in such a way as to avoid careful scrutiny by reviewing courts and others.[22/]

22/ See Pepper, Taking the Free Exercise Clause Seriously, supra at 314:

> Thus, the importance of something like the Sherbert-Yoder doctrine, of the requirement that even facially and intentionally neutral government action not impinge on the religious practices of minorities, becomes evident. The smaller the minority, the more likely the majority will inadvertently impose on its (Cont. on next page)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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22/

(Cont.) religious interests, and therefore the greater need for protection under the free exercise clause.

Supreme Court, U.S.
FILED
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No. 87-605

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

RALPH PALIKAPU O KAMOHOALI'I DEDMAN and DR. NOA EMMETT AUWAE ALULI,

Petitioners,

vs.

HAWAII BOARD OF LAND AND NATURAL RESOURCES, ESTATE OF JAMES CAMPBELL and TRUE/MID-PACIFIC GEOTHERMAL VENTURES,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF HAWAII

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RALPH PALIKAPU O'KAMOHOALII DEDMAN and DR. NOA EMMETT AUWAE ALULI, Intervenors-Appellants, and VOLCANO COMMUNITY ASSOCIATION, et al., Petitioners, vs. BOARD OF LAND AND NATURAL RESOURCES, et al., Appellees.

No. 11126

APPEAL FROM BOARD OF LAND AND NATURAL RESOURCES

(G.S. NO. 9/26/85-5)

AND

RALPH PALIKAPU O'KAMOHOALII DEDMAN and DR. NOA EMMETT AUWAE ALULI, Intervenors, and LEHUA LOPEZ, et al., Petitioners, vs. BOARD OF LAND AND NATURAL RESOURCES, et al., Appellees.

No. 11334

APPEAL FROM BOARD OF LAND AND NATURAL RESOURCES

(CDUA No. HA-12/20/85-1830)

July 14, 1987

LUM, C.J. NAKAMURA, PADGETT, HAYASHI, JJ. and INTERMEDIATE COURT OF APPEALS ASSOCIATE JUDGE HEEN IN PLACE OF WAKATSUKI, J., EXCUSED

CONSTITUTIONAL LAW -- personal, civil and political rights -- religious liberty and freedom of conscience -- in general.

In order to find an unconstitutional infringement on religious practices, it is necessary to examine whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not claimants' free exercise of religion is burdened by the regulation, the extent of impact of the regulation on the parties' religious practices, and whether or not the state has a compelling interest in the regulations which justified such a burden.

CONSTITUTIONAL LAW -- personal, civil and political rights -- religious liberty and freedom of conscience -- particular matters and applications -- zoning and land use.

Designation of an area as a geothermal resource subzone and approval of specific geothermal development plans do not infringe on claimants' freedom to exercise their religion where it is undisputed that claimants never used the land for religious purposes and have presented no objective evidence of harm to religious practices.

ADMINISTRATIVE LAW -- powers and proceedings of administrative agencies, officers and agents -- hearings and adjudications -- findings.

SAME -- same-- same -- conclusions.

Hawaii Revised Statues § 91-21 (1985) requires an agency to rule upon proposed findings, but a separate ruling on each proposed finding filed by a party is not indispensable. The statute only requires that the parties not be left to guess, with respect to any material questions of fact, or to any group of minor matters that may have cumulative significance, the precise findings of the agency.

ADMINISTRATIVE LAW -- judicial review of administrative decisions -- scope of review in general -- burden of showing error.

An agency's findings are presumptively correct, and cannot be set aside on appeal unless they are

shown to be clearly erroneous in view of the reliable, probative and substantial evidence of the records as a whole.

OPINION OF THE COURT BY LUM, C.J.

I.

This appeal presents us with various challenges to the approval of the development of geothermal energy in the Kilauea Middle East Rift Zone ("KMERZ") on the island of Hawaii. The two separate appeals taken from the decisions of Board of Land and Natural Resources ("Board") were consolidated at oral argument as they present similar facts and issues to this court. Hawaii Rules of Appellate Procedure 3(b).

Both cases challenge the decision to permit geothermal energy development in the KMERZ area on the ground that is violates Appellants' right to freely exercise their religion. In No. 11126, Appellants also allege that Board failed to adequately consider their religious claims in weighing the criteria for

establishing a geothermal resource subzone under Hawaii Revised Statutes ("HRS") § 205-5.2(d)(3)(1985).

Other errors alleged on appeal concern the designation of the area as a geothermal resource subzone and the grant of a permit to develop a 25 megawatt ("MeW") geothermal generator with exploration of development of another 75 MeW of geothermal energy in the future.

We affirm.

II.

In 1983 the Hawaii legislature passed the Geothermal Energy Act which granted the Board of Land and Natural Resources primary responsibility for establishing geothermal resource zones within the state. Act 296, § 3, 1983 Haw. Sess. Laws 638, codified at HRS § 205.2(a) (1985). Once the Board has established such zones, if the project falls within

the area zoned conservation land, as in the present case, then the Board has jurisdiction to approve the project. Act 151, § 2, 1984 Haw. Sess. Laws 279, codified at HRS § 205-5.1(d) (1985).

In the present case, Appellees The Estate of James Campbell and True/Mid-Pacific Geothermal Ventures (collectively "Campbell") applied for a conservation district use permit in the Kahauale'a area on March 2, 1982. Over the next year, the Board received the environmental impact statement on the application and conducted contested case hearings concerning this matter. On February 25, 1983, the Board heard oral argument on the application, propounded its findings of fact and conclusions of law, and rendered its Decision and Order ("February 25, 1983 Decision"). The February 25, 1983 Decision granted

Campbell the permit with 43 conditions on exploration and development of baseline activities.

In June of 1983, volcanic eruptions in the Kahauale'a area caused some question as to the safety of tapping geothermal resources in the specific site approved. In May of 1984, the Board proposed administrative rules concerning hearings on the designation and regulation of geothermal resource subzones. Also in May of 1984, the legislature passed Act 151, which mandated the Board to assess the February 25, 1983 Decision regarding the Kahauale'a area as a geothermal resource subzone. 1984 Haw. Sess. Laws § 3, at 281. In July, the Board's administrative rules concerning geothermal subzones were adopted, and in August they were amended.

Throughout 1984, various public and

contested case hearings were held around the island of Hawaii concerning designation of the Kahauale'a area as a subzone. On December 28, 1984, the Board issued its preliminary Decision and Order approving the designation of the Kahauale'a area as a geothermal subzone ("December 28, 1984 Decision"). The decision instructed Campbell to explore the possibility of a land swap wherein the Kahauale'a land, which is situated adjacent to Volcano National Park, would be exchanged for land in the Wao Kele 'O Puna Natural Area Reserve (to the east) in the KMERZ. On August 10, 1984, Campbell applied for a conservation district use permit to develop 100 MeW of geothermally generated electricity in the KMERZ.

During much of 1985 more public and contested case hearings were held on

designation of the KMERZ as a geothermal resource subzone. In October of 1985, the Board amended the December 28, 1984 Decision and approved the land swap but included an area to be later given to the nearby national park.

In November of 1985, Appellants were granted intervenor status in the scheduled contested case hearings concerning the approval of the KMERZ area as a geothermal resource subzone. The hearings were held from November 13 to 15 in Hilo. On December 20, 1985, the Board issued its Decision and Order, and on April 9, 1986, it issued findings of fact and conclusions of law ("April 9, 1986 Decision") approving of 9,014 acres as a geothermal resource subzone.

On December 27, 1985, the State and Campbell Estate exchanged deeds, the State receiving the Kahauale'a land and Campbell Estate receiving a portion of

the KMERZ area. The State reserved, however, mineral rights, including the underground steam, and required Campbell Estate "covenant that the use and enjoyment of the land conveyed shall not be in support of any policy which discriminates against anyone based upon race, creed, color or national origin." See HRS § 171-64 (1985).

The Board accepted Campbell's application for a conservation district use permit on January 3, 1986 and required that they complete an environmental impact statement on the proposed action. A public hearing on the application was heard on January 13, 1986, at which time a contested case hearing was requested. Contested cases hearings were held from February 18 to 23, 1986 and on March 14, 1986. The Board issued its Decision and Order on April 11, 1986 later amended by the

findings of fact and conclusions of law filed June 18, 1986 ("June 18, 1986 Decision"). The June 18, 1986 Decision permits Campbell to explore, develop, and produce up to 25 MeW of geothermal energy, and allows Campbell to explore for the future development of an additional 75 MeW, all subject to compliance with conditions on archaeological sites and air, water, land noise, and light pollution monitoring.

Defendants subsequently filed a motion to appeal to this court. The Board granted Appellants' motion on September 28, 1986.[1/]

[1/] In 1985, the legislature provided for appeals directly to the supreme court from decisions of the Board approving a project within the resource subzone. Act 226, § 1, 1985 Haw. Sess. Laws 414, codified at HRS § 205-5.1(f) (1985). Jurisdiction over the present appeal is based on this subsection.

III.

Appellants' religious claims regard to both the designation of a geothermal resource subzone and the granting of the permit are essentially the same. Hence, this issue is treated immediately below. Challenges to the Board's exercise of discretion involve separate issues and are treated separately for each appeal in section IV.

Appellants' main contention on appeal is that the approval of the geothermal project will infringe on their religious practices as "Pele practitioners." According to Appellant Aluli, the goddess[2/] Pele migrated to the

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2/According to Appellants, Pele is considered either an akua (god) or an aumakua (family or personal god). This distinction has significance insofar as one witness considered Pele as an aumakua, and worshipped Pele in her home.

Northwestern Hawaiian Islands from Tahiti. She then moved down the island chain until she reached the island of Hawaii where she lives today. Areas in the island chain where she attempted to establish herself are considered sacred. Appellant Aluli identified as especially sacred the area "from Moku'aweoweo [the top of], Mauna Loa, all the way down including these areas from Puna to Ka'u" on the southeastern portion of the island. Phenomena associated with the volcanic activity, i.e., heat, steam, magma, as well as the surrounding landscape, i.e., ferns, shrubs, land and even the rain, are also considered sacred. Development of geothermal resources in the area, Appellants contend, will impinge on their right to freely exercise their religion as guaranteed under the first amendment

to the United States Constitution[3/] and article I section 4 of the Hawaii Constitution.[4/]

In order to find an unconstitutional infringement on Appellants' religious practices,

> it [is] necessary to examine whether or not the activity interfered with by the state was moticated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and whether or not the state had a compelling interest in the regulation which justified such a burden.

[3/]This amendment reads in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S Const. amend. I.

[4/]This section provides in part: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof[.]" Haw. Const. art. I, §4.

State ex rel. Minami v. Andrews, 65 Haw. 289, 291, 651 P.2d 473, 474 (1982). Accord Wisconsin v. Yoder, 406 U.S. 205 (1972). Moreover, the United States Supreme Court has "long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute." Bowen v. Roy, 476 U.S. ____, ____, 106 S. Ct. 2147, 2152, 90 L. Ed. 2d 735, 744 (1986). See Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879). Accord Koolau Baptist Church, 68 Haw. ____, ____, 718 P.2d 267, 271 (1986).

Neither the Board nor Campbell questions the legitimacy and sincerity of Appellants' religious claims. We therefore turn to the issue of whether or not the parties' free exercise of

religion had been burdened by the regulation, and the extent or impact of the regulation on the parties' religious practices.

As a preliminary matter, "it is necessary in a free exercise case for one to show the coercive effect of the [law] as it operates against him in the practice of this religion." School District of Abington Township v. Schempp, 374 U.S. 203, 223 (1963). Accord Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707, 717-18 (1981); Koolau Baptist Church v. Department of Labor, 68 Haw. at ___, 718 P.2d at 272 (1986). Appellants' assert this burden though testimony that construction of geothermal energy plants will desecrate the body of Pele by digging into the ground and will destroy the goddess by robbing her of vital heat. They claim this will interfere

with their ritual practices, and will disable them from training young Hawaiians in traditional beliefs and practices (e.g., chant and hula). As such, approval of the geothermal plant does not regulate or directly burden Appellants' religious beliefs,[5/] nor inhibit religious speech.[6/] Further, the Board's action does not compel them, by threat of sanctions, to refrain from

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[5/] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985); Follet v. Town of McCormick, 321 U.S. 573, 577-78 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

[6/] Cf. Widmar v. Vincent, 454 U.S. 263 (1981); Wooley v. Maynard, 430 U.S. 705 (1977); Cantwell v. Connecticut, 310 U.S. 296 (1940).

religiously motivated conduct[7] or engage in conduct they find objectionable on religious grounds.[8] See Bowen, 476 U.S. at ____, 106 S.Ct. at 2153-54, 90 L.Ed.2d at 746 (plurality opinion); Braunfeld, 366 U.S. at 603.

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[7] Cf. Goldman v. Weinberger, 475 U.S. 502 (1986); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Cox v. New Hampshire, 312 U.S. 569 (1941); Pierce v. Society of Sisters, 268 U.S. 520 (1925); Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879).

[8] Cf. Hobbie v. Unemployment Appeals Comm'n of Florida, ____ U.S. ____, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); Thomas v. Review Board, Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981); United States v. Lee, 455 U.S. 252, 259 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sch. Dist. Abington Township v. Schempp, 374 U.S. 203 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961); West Virginia Bd of Ed. v. Barnette, 319 U.S. 624 (1943); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

Rather, Appellants assert an infringement on their religious practices. In order to demonstrate the coercive effect of the geothermal project, Appellants must show a "substantial burden" on religious interests. Koolau, 68 Haw. at ____, 718 P.2d at 272; Wisconsin v. Yoder, 406 U.S. at 218. Yet it is uncontested that "[n]either of the [Appellants] nor any of the witnesses testified that they ever conducted or participated in religious ceremonies on this land." And the Board specifically concluded that "[t]here is no indication that tapping this heat source from the earth has diminished or negatively affected the eruptive nature of Kilauea Volcano." There is simply no showing of "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."

Wisconsin v. Yoder, 406 U.S. at 218.

To invalidate the Board's actions based on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another.[9/] As Judge Learned Hand stated:

[9/]The entire amendment was designed to insulate religious activity from state involvement. See Everson v. Bd. of Education, 330 U.S. 1, 8-10 (1947); Walz v. Tax Comm'n., 397 U.S. 664, 668 (1970); Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871). See generally L. Tribe, American Constitutional Law 814-15 (1978); McCoy, A Unifying Theory for the Religion Clauses of the First Amendment, 39 Vand. L. Rev. 249, 255 & n. 20 (1978). The Supreme Court has summarized the purpose behind the free exercise clause thus: "Congress [is] deprived of all legislative power over mere opinion, but [is] left free to reach actions which [are] in violation of social duties or subversive of good order." United States v. Reynolds, 98 U.S. (8 Otto) at 164.

> The First amendment. . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life[.]

Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953). Accord Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985).

We find no merit to Appellants' claim that the project will substantially burden their religious practices. As the Board stated, "[b]y virtue of the land exchange, the proposed development site will be an additional 5 to 10 miles away from Moku'a'weoweo and Halema'uma'u where tradition suggests Pele to reside." Moving the project away from the volcanic phenomena associated with Pele further accommodates Appellants' religious

practices.

The free exercise clauses of the state and federal constitutions are "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas J., concurring). Accord Bowen, 476 U.S. at ____, 106 S.Ct. at 2152, 90 L.Ed.2d at 744. See Crow v. Gullet, 541 F.Supp. 785, 791 (D.S.D. 1982) ("the free exercise cause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out."), aff'd 706 F.2d 856 (8th Cir.) (per curiam), cert. denied sub nom. Fools Crow v. Gullet, 464 U.S. 977 (1983). See also Inupiat Community of Arctic Slope v. United States, 548 F.Supp. 182, 188-89 (D. Alaska 1982), aff'd 746 F.2d 570 (9th

Cir. 1984) (per curiam); cert. denied, ____ U.S. ____, 106 S.Ct. 68 (1985).

IV.

Appellants' other objections to development of geothermal energy in the area allege errors by the Board peculiar to each of the Board's decisions: designation of a geothermal resource subzone in No. 11126 and permit approval of a geothermal site in No. 11334.

A. Case No. 11126

Appellants assert that Board's procedure in designating the area as a geothermal resource subzone violates due process in that the Board's Administrative Rule § 13-184-6[10/] failed to provide an

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10/This rule reads:

Criteria for the designation of subzones. The board, in designating an area a geothermal resource subzone, shall be guided by the (Cont. on next page)

"ascertainable standard sufficient to meet constitutional requirements," and

---

10/(Cont.) selection of those areas that can demonstrate an acceptable balance among the criteria set forth below:

(1) That the area has potential for geothermal activities;
(2) That there is a known or likely prospect for the utilization of geothermal resources for electrical energy production;
(3) That any potential geologic hazards to geothermal production or use in the proposed area are examined;
(4) That any environmental or social impacts of the development of geothermal resources within the proposed area be considered;
(5) That the compatibility of development and utilization of geothermal resources within the proposed area is considered with other allowed uses within the area and within the surrounding lands; and
(6) That the potential benefits to be derived from geothermal development and utilization in the proposed area be in the interest of the county or counties involved in the State as a whole.

Administrative Rules of the Department of Land and Natural Resources, § 13-184-6 (1984).

the Board's delegate, the Department of Water and Land Development ("DOWALD") failed to adequately assess the potential effects of subzoning. They further allege the Board erred in accepting or rejecting their proposed findings concerning the impact of the proposed development on Pele practitioners. We take each issue in turn.

In the past, we have given great deference to an administrative agency's interpretation of its legislative mandate and its own administrative rules. See e.g., Aio v. Hamada, 66 Haw. 401, 407, 664 P.2d 727, 731 (1983); Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 424, 653 P.2d 420, 426 (1982). "Although administrative convenience or even necessity cannot override the constitutional requirement of due process, . . . agencies 'should be free to fashion their own rules of procedure

and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" Yamada v. Natural Disaster Claims Commission, 54 Haw. 621, 627, 513 P.2d 1001, 1005 (1973) (citation omitted) (quoting F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940) (footnote omitted)).

Administrative Rule § 13-184-6 substantially adopts the criteria for establishing a geothermal resources subzone set forth by the legislature in HRS § 205-5.2(b) (1985). The following subsection, HRS § 205-5.2(c), states "[m]ethods for assessing the factors in subsection (b) shall be left to the discretion of the board and may be based on currently available public information." Thus, the statutory scheme explicitly contemplates the Board's use of its discretion in determining the

appropriate boundaries for designation of the geothermal resource subzone. We hold the statute is sufficiently clear to comport with due process. Cf. Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 830-31 (1st Cir.) (regulation requiring subdivision plan to be in "best interests of the town" not unconstitutionally vague), cert. denied 459 U.S. 989 (1982); Dillow v. City of Peoria, 49 Ill.2d 314, ____, 274 N.E.2d 96, 97-98 (1971) (ordinance with purpose to protect "high ration of home ownership" not vague); Maryland-National Capital Park and Planning Commission v. Mayor and Council of Rockville, 272 Md. 550, ___, 325 A.2d 748, 753-54 (1974) (statute not permitting land use changes "substantially different" not vague).

Appellants also allege the initial assessment done by DOWALD's Manager-Chief

Engineer Manbu Tagomori was based on unconstitutionally vague standards. Tagomori testified that the team evaluated the appropriate area based on "personal experience" and "best judgment." The fact that Tagomori's team used these sources in identifying the appropriate area does not invalidate the proposal. This is precisely what the Board was mandated to do. HRS § 205-5.2(c). Moreover, the statute and the relevant administrative rules only requires use of the guidelines in evaluating final approval of the subzone. HRS § 105-5.2; Administrative Rules of the Department of Land and Natural Resources, §§ 13-184-2 through 13-184-9. Designation of the subzone was the subject of extensive hearings by the Board in reviewing the various evidence put before it. There is simply no merit

to Appellants' claim that they were denied due process.

Appellants' contention that the Board failed to accept or reject certain proposed findings is also without merit. HRS § 91-12 (1985) does require an agency to rule upon proposed findings, but "a separate ruling on each proposed finding filed by a party is not indispensable." In re Hawaiian Telephone Co., 54 Haw. 663, 668, 513 P.2d 1376, 1379 (1973) (quoting In re Terminal Transportation, Inc., 54 Haw. 134, 139, 504 P.2d 1214, 1217 (1972)). It requires that the parties not be left to guess, with respect to any material questions of fact, or to any group of minor matters that may have cumulative significance, the precise findings of the agency. Id.

The Board accepted Appellants' proposed findings of fact 12 and 18, set

out in the margin,[11/] when if found:

[11/]The proposed findings of fact read:

> 12. Pele is central and indispensable to Native Hawaiian religious beliefs and practices.
>
> . . . .
>
> 18. Pele influences and informs the daily physical and spiritual life of Pele practitioners. It is essential to them that Pele not be violated and degraded, and that she be allowed to exist in her unaltered form and in a pristine natural environment.
>
> . . . .
>
> 21. Geothermal exploration and development will diminish and finally destroy Pele's creative force. This will cause spiritual, cultural, psychological and sociological injury to the people who worship and respect Pele.
>
> . . . .
>
> 25. Violation and desecration of the sacred body of the god Pele as Pele practitioners believe will occur with geothermal exploration and development, will destroy the relationship and communication which Pele practitioners have with the god Pele.

> 136. . . . Pele is believed to also be present in the sacred area surrounding the Kilauea Volcano in kinolau (alternate body forms) such as ferns, certain shrubs and trees, and certain volcanic land forms or features, such as significant pu'u (hills).
>
> . . . .
>
> 139. . . . There was testimony indicating that Pele is a spiritual concept central to the lives and psychological survival of the believers, and that Pele provides inspiration, strength and a focus for their lives. . . .

Further, the Board rejected findings 21 and 25, also set out in the margin, when it determined that Appellants failed to show sufficient burden on their religious practices.

B. Case No. 11334

In this appeal, Appellants challenge the Board's findings with respect to the economic feasibility of the development of geothermal energy. Additionally, they argue the Board has filed to apply its

regulations with regard to permitted uses for granting a conservation district use permit in a subzone P (Protected) area.

Both of these contentions are without merit. The Board's findings of fact are presumptively correct, and cannot be set aside on appeal unless they are shown to be "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Stop H-3 Ass'n. v. State Department of Transportation, 68 Haw. ___, ___, 706 P.2d 446, 451-52 (1985) (quoting HRS § 91-14(g) (1976)). There was more than sufficient evidence before the Board to conclude development of 25 MeW of energy would be presently economically feasible and the island's energy needs would likely increase in the future.

With regard to the subzone classification, the Board redesignated

the KMERZ area as a geothermal resource subzone as a result of the previous contested case hearings. Hence, there was no requirement that the Board consider subzone P criteria in granting the conservation district use permit to Campbell.

V.

A claim of constitutional infringement on religious practice requires a burden showing significant harm. Appellants have not shown a burden of constitutional dimension.

Appellants' other assertions of error are also without merit. The April 9, 1985 Decision approving the geothermal resource subzone and the June 18, 1986 Decision granting the conservation district use permit are affirmed.

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Aluli in No. 11126 and
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in No. 11334

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APPENDIX B

BEFORE THE BOARD OF LAND
AND NATURAL RESOURCES

STATE OF HAWAII

In the matter of the	)	CDUA NO.
Conservation District	)	HA-12/20/85-1830
Use Application of the	)	Findings of Fact
Estate of James Campbell	)	Conclusion of Law

Honolulu, Hawaii

June 18, 1986

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ABBREVIATIONS

BLNR	Board of Land and Natural Resources
Board	Board of Land and Natural Resources
CDUA	Conservation District Use Applications
DLNR	Department of Land and Natural Resources
DOH	Department of Health
DOWALD	Division of Water and Land Development
dBA	Decibles
EPA	Environmental Protection Agency
GRS	Geothermal Resources Subzone
KMER/GRS	Kilauea Middle East Rift Geothermal Resource Subzone
HAAQS	Hawaii Ambient Air Quality Standards
HELCO	Hawaii Electric Light Company
HECO	Hawaiian Electric Company
Ldn	Day-night noise levels
SLUC	State Land Use Commission
MW	Megawatts of Electrical Power

NAR	Natural Area Reserve
NPS	National Park Service
VCA	Volcano Community Association
OEQC	Office of Environmental Quality Control
ppm	Parts Per Million
ppb	Parts Per Billion
APP	Applicant
Ex	Exhibit
EIS	Environmental Impact Statement
TR	Transcript

I. INTRODUCTION

Geothermal energy is considered the State's largest and only near-term alternative source of base-load electrical energy. Geothermal energy has been proven to be a reliable source of energy in many parts of the world including the United States. In the Geyser region of Northern California, over 1,000 megawatts (MW) of electrical power is currently produced by a geothermal source.

Hawaii is presently over 90% dependent on imported fossil fuel for its energy. It is the State of Hawaii's objective to become energy self sufficient and independent of imported fuel by developing renewable indigenous resources for electrical power generation. It is the State's objective to "accelerate the transition to an

indigenous renewable energy economy by facilitating private sector activities to explore supply options and achieve local commercialization and application of appropriate alternate energy technologies." (State Energy Plan, June, 1984, p. 15)

II. BACKGROUND

To understand the context in which this application arises, it is necessary to briefly review the history of the applicant's geothermal proposals. On March 2, 1982, the Estate of James Campbell filed a Conservation District Use Application (CDUA) with the Department of Land and Natural Resources to develop geothermal resources at Kahauale'a, Hawaii. This CDUA, No. HA-3/2/82-1463, was processed and a draft Environmental Impact Statement prepared. On May 20, 1982 a petition for a

contested case hearing on the CDUA was filed. The petition was granted. The contested case hearing was convened on October 5, 1982, and continued on October 25 through 29, 1982, November 15 through 19, 1982, and December 7 through 10, 1982.

The Board of Land and Natural Resources (BLNR) made extensive findings of fact, issued a conclusion of law, and decision and order dated February 25, 1983, granting the Estate of James Campbell limited exploration rights within a designated area of 800 acres located at Kahauale'a, Puna, Hawaii.

Subsequent to the BLNR's February 28, 1983 decision and order, the Hawaii State legislature passed Act 296, SLH 1983, delegating to the BLNR the responsibility of designating geothermal resource subzones throughout the State of Hawaii by selecting those areas that best

demonstrate an acceptable balance among seven criteria now codified in HRS 205-5.2.

Pursuant to Act 296, SLH 1983, the Chairperson of the BLNR assigned the Division of Water and Land Development (DOWALD), of the Department of Land and Natural Resources (DLNR) the task of assessing and recommending geothermal resource subzones (GRS). DOWALD began work on the assessment of potential geothermal resource subzones on June 14, 1983, when Act 296, SLH 1983 was signed into law.

In 1984, the Legislature passed Act 151. This act gave first priority to the assessment of the Kahauale'a area as a potential geothermal resource subzone and required the BLNR to act on the designation of the Kahauale'a area by December 31, 1984. DOWALD assessed the

Kahauale'a area and proposed a 5300-acre area for designation as a GRS.

Public information meetings and public hearings were held as part of the subzone designation process. At the public hearing held on September 12, 1984 in Hilo, Hawaii, requests for a contested case hearing on the proposed Kahauale'a GRS, were made to the BLNR and subsequently granted. The BLNR conducted the contested case hearing on December 12-20, 1984 in Hilo, Hawaii and issued its decision and order on December 28, 1984.

In the December 28, 1984 decision and order, the BLNR designated the 800-acre area described in its February 25, 1983 decision and order as a geothermal resource subzone under the following conditions upon:

(1) Cessation of volcanic activity

in, around and near the area permitted by the Board's February 25, 1983 decision and order.

(2) No new geothermal development activity associated with the permitted area shall be considered until after it has been determined that the geologically hazardous and eruptive activity has creased.

(3) The Board formally requested the Estate of James Campbell to investigate and consider a land exchange involving State-owned lands in the Kilauea Middle East Rift Zone and Campbell Estate's lands at Kahauale'a.

(4) The BLNR further resolved to consider the Kilauea Middle East Rift Zone for designation as a GRS on the basis of information presented at the contested case hearing which indicated that Campbell's Kahauale'a property

contained higher quality native habitat than the Wao Kele 'O Puna Natural Area Reserve (NAR).

(5) The Board directed the Division of Water and Land Development to assess the Kilauea Middle East Rift Zone in and adjacent to the Wao Kele 'O Puna Natural Area Reserve beginning on the western boundary of the existing Kamaili GRS. This area had not previously been evaluated as a GRS because of its classification as a Natural Area Reserve. Conversely, the privately owned Kahauale'a lands had not been previously considered as a natural area reserve because under State law, natural area reserves may only be on State land.

(6) The decision further stated that if (a) the assessment of the Kilauea Middle East Rift Zone does not result in a designation as a geothermal resource

subzone, or (b) a land exchange between the State of Hawaii and the Estate of James Campbell is not consummated, then the remainder of the 5300 acre Kahauale'a area originally proposed by DOWALD for designation as a GRS, shall be designated as a GRS.

(7) The Board urged the federal government and the National Park Service (NPS) to seek acquisition of Tract 22 (described in the Volcanoes National Park Master Plan), which the State will not itself seek, but which is desired by the NPS for addition to the Volcanoes National Park.

(8) Finally, the decision provided that ". . . if the State of Hawaii and Campbell Estate should later consummate a land exchange involving lands at Kahauale'a for State or other lands upon which geothermal activities may take

place, then the geothermal subzone designation in this Decision and Order shall crease to exist and shall have no force or effect in law. . ."

Pursuant to the decision and order of December 28, 1984, DOWALD conducted an assessment of the Kilauea Middle East Rift Zone in an adjacent to the Wao Kele 'O Puna NAR for a geothermal resource subzone, using the same criteria set forth in Act 296, SLH 1983.

The assessment of the Kilauea Middle East Rift Zone is outlined in the DOWALD Circular C-114 (State Ex. 2, G.S. No. 9/26/85-5) and in the proposal to designate the area as a GRS (State Ex. 1, G.S. No. 9/26/85-5).

The BLNR held a public hearing on the proposed designation of the Kilauea Middle East Rift as a geothermal resource subzone on September 26, 1985, and at

that time, a request for a contested case hearing was made to the BLNR.

On October 16, 1985 the BLNR announced that a contested case hearing would be held on the proposed GRS designation on November 12, 1985, in Hilo, Hawaii. On November 13, 14, and 15, 1985, the BLNR conducted a contested case hearing on the proposed designation of 11,745 acres in the Kilauea Middle East Rift Zone as a geothermal resource subzone. On December 20, 1985, the Board issued a decision and order designating approximately 9,014 acres of the Wao Kele 'O Puna area as a GRS. On April 9, 1986, the Board issued its findings of fact, conclusions of law and revised decision and order.

IV. FINDINGS OF FACT

The Board of Land and Natural Resources makes the following Findings of Fact. These findings of facts are organized for convenience and clarity in accordance with the factors identified in HRS 205-5.2 and Campbell Estate's application. The Board incorporates by reference all of the record in each of the previous proceedings related to Campbell Estate's geothermal development applications and GRS designations:

1. Kahauale'a CDUA, file No. HA-3/2/82-1463.

2. Kahauale'a Subzone designation, file No. 8/27/84-1

3. Kilauea Middle East Rift Subzone designation, file No. 9/26/85-5.

Hawaiian Religion and Traditions

91. The current day practice of Native Hawaiian religion includes the worship of the goddess Pele. Many native Hawaiians regard Pele as an akua (god) or as aumakua (family or personal god). Some native Hawaiians also identify themselves as the bloodline of Pele. Hawaiians who actively worship the goddess Pele have been identified as "Pele practitioners". (Written Testimony of Manabu Tagomori, G.S. No. 9/26/85-5; Testimony of Dr. Emmett Aluli, G.S. No. 9/26/85-5)

92. Pele practitioners believe Pele is a living deity, whose presence is manifested in periodic and frequent volcanic eruptions. (Testimony of Dr. Emmett Aluli, Ex. 2, G.S. No. 9/26/85-5)

93. However, there are other Hawaiians who have very different

beliefs. One witness testified that according to traditional Hawaiian religion, there are four major gods: Ku, Kane, Lono, and Kanaloa. The responsibility of volcanism rests with the god, Ku. The deity to which this responsibility was delegated was a god named 'Aila'au, which means "one who consumes forests". The god "Aila'au is considered indigenous to the Hawaiian tradition. (APP. Ex. 19, p. 1)

94. It was the testimony of two Pele practitioners that they believe that the area of active volcanism is in fact Pele's physical body, her home or abode. They testified that some individuals believe Pele's home encompasses an area extending from Mauna Loa through the Kau and Puna districts to the ocean, including the entire area of the Kilauea Volcano and the East and Southwest Rift

Zones. (Testimony of Dr. Emmett Aluli, G.S. No. 9/26/85-5)

95. It is believed that Pele may have migrated to the Hawaiian Islands. Her domicility can be traced to several other islands of Polynesia before coming to Hawaii, among these being Tahiti, Samoa and Aitutaki. Although accounts of her sojourn today are not clear, one witness testified through a chant describing Pele's migration to Kauai, through Oahu and finally settling down in Puna. (APP. Ex. 19, p. 1; Testimony of Puulani Kanahele, TR Vol. VIII, pp. 108-109)

96. In a book entitled, "Hawaiian Mythology", compiled by Beckwith and including information from highly respected native Hawaiian scholars, it is stated that Pele approaches the Hawaiian Islands from the northwest, tries island

after island without success and finally settles on Hawaii at the crater Moku'a'weoweo. (APP. Ex. 19, p. 2)

97. Most Hawaiian history was orally passed from generation to generation until 1820 where some form of written history began. (Testimony of Abraham Piianaia, TR Vol. XI, p. 52)

98. Abraham Piianaia, Director of Hawaiian Studies at the University of Hawaii, and a native Hawaiian testified that he was told by his grandparents that the Moku'a'weoweo is the actual home of Pele, not Halema'uma'u. The name Halema'uma'u means "home of the ma'uma'u fern", where as Moku'a'weoweo means "a fiery red island" which refers to what the firepit looks like, particularly during an eruptive period. In addition, he testified that he was also told that those Hawaiians who were truly devotees

of Pele paid homage to her at Moku'a'weoweo. Halema'uma'u became a place where Pele is worshipped as a matter of convenience. (APP. Ex. 19, pp. 2-3)

99. Today, Pele practitioners worship Pele by making offerings to her. The specific details of how and where such private offerings are made were not presented to the Board during the contested case hearing. There was testimony indicating that Pele is a spiritual concept central to the lives and psychological survival of the believers, and that Pele provides inspiration, strength and a focus for their lives. (Intervenors Aluli and Dedman, Ex. 2, and Pre-Hearing Statements, G.S. No. 9/26/85-5)

100. By virtue of the land exchange, the proposed development site will be an

additional 5 to 10 miles away from Moku'a'weoweo and Halema'uma'u where tradition suggests Pele to reside. It will be further removed from Puu O'o's current eruptive activity than the applicant's original proposal at Kahauale'a.

101. Dr. Aluli and Palikapu Dedman testified that they considered any activity impermissible within the area considered to be Pele's abode. The Board notes that there are existing man-made structures including wells throughout lower Puna. The belief that geothermal exploration and development will cause desecration of Pele is not a view universally held by all Hawaiians. In fact, some Hawaiians believe that the development of geothermal energy is not counterproductive to native Hawaiian culture and heritage. One person

testified that "the traditional Hawaiian culture is one of sharing and self-sufficiency by using the natural resources, including geothermal resources to the fullest extent possible to support the population with less impact not only to the population than and into the future, but also to the environment. Cognizant of this heritage, it is my opinion that the use of geothermal energy is in keeping with those traditions. . ." (APP. Ex. 7, p. 2)

102. Historical accounts of native Hawaiian activity indicate that early Hawaiians did on occasion use geothermal steam for cooking food for non-religious purposes. (Written Testimony of Manabu Tagomori, G.S. No. 9/26/85-5)

103. The Board concludes that there are a variety of religious beliefs held by native Hawaiians. Many beliefs are

very strongly held. Some have well recognized traditions and practices. However, there is little or no evidence in the record that actual religious practices presently take place within the area proposed for the geothermal development. Neither of the parties making religious claims nor any of the witnesses testified that they had ever conducted or participated in religious ceremonies on this land. Moreover, while this property is private not public land, archaeological surveys will be conducted to insure protection of any sites that may exist.

104. The testimony presented by Pele practitioners represents their faith and personal beliefs which appear to be strongly held. The Board finds that the religious concerns of native Hawaiians deserve respect and that care should be

taken not to prohibit them from exercising their religious beliefs. However, the freedom to exercise one's religion does not mean that the activities of all others (which may not comply with the beliefs of some practitioners) are proscribed. The HGP-A well has been in production since the early 1980's. There is no indication tht tapping this heat source from the earth had diminished or negatively affected the eruptive nature of the Kilauea Volcano. In fact, Kilauea began its current eruptive phases in January, 1983 casting untold measures of heat and millions of cubic yards of magma forming many miles of lava flows after HGP-A came into production. The heat given up by volcanic eruptions is so much larger (by orders of magnitude) than any drawn by using already heated geothermal steam that comparison is meaningless. (VCA,

Ex. C, video cassette of the eruptions of Kilauea Volcano during 1983 at the April 12, 1984 hearing)

105. The former director of the Hawaiian Volcanoes Observatory testified that there is approximately 4,400 MW of thermal intrusion into the Kilauea summit and East Rift Zone each year. (VCA, Ex. 182, HA-1463)

106. Geothermal energy, being pressured steam derived from pockets of water recharged by percolation beneath the earth's core surface and heated from the earth's core, is continually renewed. Whatever may be removed will be replenished many times over. The Board finds no evidence that limited drilling of the earth's crust will irretirevably cool the thermal heat of the earth's central core or eliminate geothermal stream from beneath the Kilauea East Rift Zone.

I. RULINGS OF PARTIES' PROPOSED FINDINGS OF FACTS

The Board makes the following rulings on the parties proposed findings of facts. Findings rejected by the Board have been rejected because they are taken out of context, or they are, in whole or in part, contrary to the facts or the law, or because they are immaterial:

5. Social Impact

	Findings Accepted By the Board
Applicant:	E(1)(a)-(g) E(1)(i)-(n) E(2)(a)-(d) E(3)
COH:	114, 132-139, 143, 144, 261
Sierra Club:	B(a)1-2, B(a)5-6, (8), (10) B(b)2, 4, 5 B(c)22-24, (34) B(d)2, 5
Dedman, Aluli:	4, 7, 9, 11, 17, 18
Kirkendall:	E(1), (3), (5)-(9) G(1); H(i)-(4), (6)
Warshauer:	No specific findings submitted
Heuer:	
LaPlante:	
Dedman/Aluli:	Religious belief*/: 1-3, 6, 8, 10, 12-16 20-23, 25-29

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*/Many of Dedman/Aluli findings are matters of religious belief that can neither be accepted nor rejected.

	Findings Rejected By the Board
Applicant:	E(1)(h)
COH:	
Sierra Club:	B(a)3-5; B(a)(7), (9) B(a)11; B(b)1, (3) B(b)6-10 B(c)17-21, 25, 26 B(c)28-33; B(d)1, 3, 4
Dedman, Aluli:	5, 12, 19, 24, 30
Kirkendall:	E(2), (4), (10), (11) H(5) - (7)
Warshauer:	No specific findings submitted
Heuer:	B(1), (2)
LaPlante:	4
Dedman/Aluli:	Religious belief*/: 1-3, 6, 8, 10, 12-16 20-23, 25-29

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*/Many of Dedman/Aluli findings are matters of religious belief that can neither be accepted nor rejected.

CONCLUSIONS OF LAW

Religious Claims

Among individuals of Hawaiian ancestry there are some who have sincere and deeply felt religious beliefs surrounding the deity Pele. While these beliefs appear to be strongly held, they are not the only religious beliefs held by Hawaiians. There are a variety of religious customs and beliefs, and many religious interpretations even among the follows of the Pele tradition.

The first amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting free exercise thereof. . .". Some individuals claim that the exercise of their religious activities will be impermissibly burdened by the proposed geothermal project.

In reviewing the testimony and the evidence in the record, the board concludes that while deeply held religious beliefs deserve great respect, there is no evidence in the record to show how individuals would be actually prohibited from freely exercising their religion. They are free to carry on their religious activities in the same manner as they may have prior to this decision.

There is in fact little or no evidence on the record showing that any party or any witness has actually used or engaged in any religious activity on this land. Simply stated, claimants have failed to show how their religious activities would be prohibited on this property.

The activities authorized by this decision do not prohibit any ceremony,

custom, practice, habit or access to religious sites. Indeed the record fails to disclose any known religious sites on the subject property. The conditions in this order require that if archaeological surveys discover such sites, the landowner must protect and preserve them.

This land, once public, now private was exchanged by the State in order that the State could acquire Kahauale'a which is the site of the present volcanic activity at Puu O'o and nearer to Kilauea Crater, which is traditionally associated with Pele. The exchange would actually afford greater protection of customary practices associated with the crest of Kilauea Crater.

While courts have recognized that religious activities are subject to reasonable regulation of time, place and manner, not even those issues are

presented here. This decision does not proscribe or restrict any behavior, training, educational activity, writing, distribution of literature, proselytization, or any other manner of expression.

Religious claimants also point to traditional and customary rights of ahupua'a tenants which are protected in Article XIII, Section 7 of Hawaii's State Constitution. The exchange deed transferring this land to Campbell Estate contained in it an express reservation of the rights of native tenants. Individuals who are tenants of the ahupua'a may continue to exercise the rights of native tenants in accordance with the law. Neither the parties raising religious claim are tenants of the ahupua'a in question.

Dr. Aluli and Mr. Dedman appear to

make two major contentions. First, they believe that Pele's presence extends throughout a geographical area from Mauna Loa to Halema'uma'u and down the east rift almost to the sea. Second, they believe certain activities in Pele's "home", such as drilling geothermal steam, offend the spirit and are in their view, sacrilegious. They contend that drilling for pressurized steam could drain and "kill" Pele.

Theological claims are matters of belief. It would violate the establishment clause for the Board to pass upon them as true or false. However, the Board is aware of the existence of numerous man made structures in the lower rift zone and near this property including existing and planned geothermal wells which have never been challenged on religious grounds.

Moreover, the record is completely lacking in any evidence to suggest that a finite number of geothermal wells will deplete the continually renewing reservoir of hot pressurized steam immediately below the earth's surface. Non specific claims that geothermal drilling will draw, diminish, and cool the heat from the earth's core so as to eliminate the rising steam along the Middle East Rift simply do not comprehend the relatively inconsequential role of human activity in comparison to large geological phenomenon. One volcanic eruption displaces vastly more heat and lava than any geothermal project could ever draw.

For these reasons, the Board concludes that the activities proposed by the applicant and authorized by this decision do not violate the claimant's

freedom to exercise their religion under the first amendment or under state law.

(3)

Supreme Court, U.S.
FILED
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CLERK

No. 87-605

In The
Supreme Court of the United States
October Term, 1987

RALPH PALIKAPU O KAMOHOALI'I DEDMAN and Dr. NOA EMMETT AUWAE ALULI,

Petitioners,

v.

HAWAII BOARD OF LAND AND NATURAL RESOURCES, ESTATE OF JAMES CAMPBELL and TRUE/MID PACIFIC GEOTHERMAL VENTURES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

RESPONDENT HAWAII BOARD OF LAND AND NATURAL RESOURCES' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state land use permit authorizing private geothermal development on private land, upon which petitioners have never conducted any religious ceremonies, violates petitioners' First Amendment rights freely to exercise their native Hawaiian religion?

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No. 87-605

In The

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October Term, 1987

RALPH PALIKAPU O KAMOHOALI'I DEDMAN and Dr. NOA EMMETT AUWAE ALULI,

Petitioners,

v.

HAWAII BOARD OF LAND AND NATURAL RESOURCES, ESTATE OF JAMES CAMPBELL and TRUE/MID PACIFIC GEOTHERMAL VENTURES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

RESPONDENT HAWAII BOARD OF LAND AND NATURAL RESOURCES' BRIEF IN OPPOSITION

The State of Hawaii Board of Land and Natural Resources, Respondent in this Court, respectfully prays that the Petition for Certiorari to review the judgment of the Supreme Court of Hawaii entered July 14, 1987, be denied.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 740 P.2d 28 (Haw. 1987), and is reprinted in Petitioners' Appendix ("Pet. App.") "A." The findings of fact and conclusions of law of the State of Hawaii Board of Land and Natural Resources are not reported and are reprinted in part in Pet. App. "B."

JURISDICTION

The judgment of the Supreme Court of Hawaii was entered on July 14, 1987, and the Petition for Certiorari, invoking 28 U.S.C. § 1257(3) as the basis for review, was timely filed on October 13, 1987.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part that

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

The Fourteenth Amendment to the Constitution provides in relevant part that

> No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Act 296, Session Laws of Hawaii 1983, as amended by Act 151, Session Laws of Hawaii 1984, now codified in Hawaii Revised Statutes, sections 205-5.1 and 205-5.2, which authorizes and directs the Board of Land and Natural Resources to evaluate and designate geothermal resource subzones throughout the State, is reprinted in Appendix ("App.") "A."

———o———

STATEMENT OF THE CASE

This case arises out of the first effort by the State of Hawaii to plan and regulate geothermal development on the Big Island of Hawaii in order to reduce the State of Hawaii's present dependence upon imported fossil fuel for more than ninety percent of its energy needs.

1. In 1983 Hawaii's legislature adopted Act 296, Session Laws of Hawaii 1983, and, in 1984, amended it by Act 151, Session Laws of Hawaii 1984, *codified,* Haw. Rev. Stat. § 205-5.1 and 205-5.2. Act 296 as amended directs the Hawaii Board of Land and Natural Resources ("Board") to assess the entire State, on a county-by-county basis, for geothermal potential and to designate "geothermal resource subzones" in those areas that best demonstrate an an acceptable balance among seven specific factors set forth at Haw. Rev. Stat. § 205-5.2 (b), App. "A," *infra,* at A3-4. In adopting this law, our Legislature found that "development and exploration of Hawaii's geothermal resources is of statewide concern, and that this interest must be balanced with interests in preserving Hawaii's unique social and natural environment." Act 296, § 1, 1983 Haw. Sess. L. 636. The law "provide[s] a policy that will assist in the location of geothermal resources development in areas of the lowest potential environmental impact," *id.,* and requires the Board to consider "[s]ocial and environmental impacts[.]" Haw. Rev. Stat. § 205-5.2(b)(4) (1985). This mandate runs concurrently with the Board's powers under Hawaii's statewide land use classification and management schemes, Haw. Rev. Stat. chs. 171, 183, and 205.

2. In 1982, before the Board enjoyed specific regulatory power under Acts 296 and 151, the Estate of James

Campbell,[1] and True/Mid-Pacific Ventures, co-respondents here, petitioned the Board under its existing regulatory programs under Chapter 183, Haw. Rev. Stat., for a Conservation District Use Permit to develop geothermal energy at Kahauale'a, Puna, Hawaii, south of Hilo and adjacent to the Hawaii Volcanoes National Park in the eastern portion of the Big Island of Hawaii. This petition triggered the first of four separate "contested cases" before the Board under the Hawaii Administrative Procedures Act, Haw. Rev. Stat. ch. 91. Pet. App. B at 41-50 (summarizing the four-year hearing process). The first two cases, involving the Estate's initial application at Kahauale'a in the Kilauea upper east rift zone, were mooted when the Estate and the State of Hawaii concluded an agreement on December 27, 1985, exchanging 27,644 acres of land owned by the State in the Kilauea middle east rift zone ("KMERZ") for more than 25,000 acres of land the Estate originally sought to develop. The new land the Estate received is 10 to 15 miles away from and downrift of the environmentally sensitive and historically important Hawaii Volcanoes National Park. Under the terms of the exchange, the State of Hawaii retains the underlying mineral rights pertaining to the KMERZ parcel, *e.g.*, rights to underground steam. *Dedman v. Board of Land and Natural Resources*, 740 P.2d 28, 31 (Haw. 1987), Pet. App. 11-12. The Estate obtains surface rights, including the rights to invoke Hawaii's remedies of trespass and ejectment, subject to a covenant "that the use and enjoyment of the land conveyed shall not be in support of any

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[1] The Estate is one of the largest landowners in Hawaii, which has one of the strongest land oligopolies in the Nation. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232 (1984).

policy which discriminates against anyone based upon race, creed, color or national origin'' and subject to the rights of native tenants. *Id.*

3. The land exchange led to the third and fourth cases under Chapter 91. In the third case, the Board, acting pursuant to its affirmative mandate under Acts 296 and 151, designated 9,014 acres in the KMERZ as a geothermal resource subzone. In the fourth case, the Board granted Campbell Estate a Conservation District Use Permit to explore for up to 100 megawatts, and to develop up to 25 megawatts of geothermal energy. *See Dedman,* 740 P.2d at 31, Pet. App. 12. Petitioners, Ralph Palikapu O Kamahoali'i Dedman, and Dr. Noa Emmett Auwae Aluli, presented testimony in these proceedings that decisions by the Board favorable to the Estate would give rise to generalized ''spiritual harm'' and desecration of the physical manifestations of their Native Hawaian goddess Pele, which include ''volcanic activity, i.e., heat, steam, magma, as well as the surrounding landscape, i.e., ferns, shrubs, land and even the rain.'' *Dedman,* 740 P.2d at 31, Pet. App. at 12. The Board heard extensive testimony on the impact of the proposed geothermal activities on petitioners' religious practices and interpreted the statutory duty to consider social impacts to include consideration of petitioners' religious interests and First Amendment claims. *Cf. Ohio Civil Rights Commission v. Dayton Christian School,* 106 S. Ct. 2718, 2724 (1986). Petitioners acknowledged that neither they nor any of their witnesses '' 'ever conducted or participated in religious ceremonies on this land.' '' 740 P.2d at 33, Pet. App. at 21. Nor did petitioners make any showing that '' 'tapping this heat source from the earth has diminished or negatively

affected the eruptive nature of Kilauea Volcano.' " *Id.* Following the Board's decisions in favor of geothermal development, petitioners took a direct appeal to the Supreme Court of Hawaii under the provisions of Haw. Rev. Stat. § 205-5.1(f).

4. On appeal, the Supreme Court of Hawaii affirmed over petitioners' claims under the Free Exercise Clause. Rejecting petitioners' broad claims, which would have the effect of blocking geothermal development anywhere in the State of Hawaii, the Supreme Court of Hawaii accepted without challenge that petitioners' Native Hawaiian beliefs about Pele were sincere and "religious" within the meaning of the Free Exercise Clause, but held that, because petitioners could not show "a 'substantial burden' on religious interests[,]" their Free Exercise Clause claims failed. *Dedman,* 740 P.2d at 33, Pet. App. at 21.

The state court relied directly upon this Court's opinion in *Bowen v. Roy,* 106 S. Ct. 2147 (1986), which rejected the claim by Native American parents that the mandatory use of a Social Security number for their daughter, Little Bird of the Snow, "harm[ed] [their] daughter's spirit." *Id.* at 2152, *cited,* 740 P.2d at 32, 33, Pet. App. at 17, 24. As in *Roy,* the Supreme Court of Hawaii reasoned that, when only generalized "spiritual" harm is shown, the Free Exercise Clause simply "does not afford an individual a right to dictate the conduct of the Government's internal procedures." 106 S. Ct. at 2152. The Supreme Court of Hawaii also reasoned that the Board, even if it did not have the right to permit geothermal development everywhere, had permissibly exercised its power here after making substantial accommodations to petitioners' beliefs by

"[m]oving the project away from the volcanic phenomena associated with Pele," *Dedman,* 740 P.2d at 33, Pet. App. at 23-24.

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REASONS FOR DENYING THE WRIT

I. The Hawaii Supreme Court Did Not Misapply This Court's First Amendment Free Exercise Decisions.

The Supreme Court of Hawaii, following the standard established by this Court in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), examined first the legitimacy and sincerity of petitioners' beliefs, which neither the Board nor the Estate challenged. Following *Bowen v. Roy,* 106 S. Ct. 2147, 2152 (1986), the state court noted the long-recognized distinction between freedom of individual belief, which is absolute, and freedom of individual conduct, which is not absolute. Then, applying *Thomas v. Review Board, Indiana Employment Security Division,* 450 U.S. 707, 717-718 (1981), the court examined the coercive effect or the burden upon petitioners that might result from the proposed activities and found none. The court, like the Board, found that the approval of the geothermal plant did not regulate or directly burden petitioners' religious beliefs or religious speech. *Dedman,* 740 P.2d at p. 32, Pet. App. at p. 19. Referring next to *Bowen,* 106 S. Ct. at 2153-54, the Hawaii court found that the Board's actions did not compel petitioners by threat of sanction to refrain from religiously motivated conduct or to engage in conduct objectionable to religious belief. Finally, the lower court, as this Court had in *Yoder,* 406 U.S. at 218, looked at petitioners' claim that the Board's action would infringe upon their religious

practices. Observing that "[n]either of the [petitioners] nor any of the witnesses testified that they had ever conducted or participated in religious ceremonies on this land" and that "[t]here is no indication that tapping the heat source from the earth has diminished or negatively affected the eruptive nature of Kilauea Volcano", *Dedman*, 740 P. 2d at 33, Pet. App. at 21, the Hawaii court could not find evidence of the kind of objective harm the Free Exercise clause is designed to prevent. *Id.*

Petitioners rely upon *Sherbert v. Verner*, 374 U.S. 398 (1963), to argue that the Hawaii court should have instead applied a test which provides that if the "primary effect" of a government action "impermissibly infringes upon religion," then the government activity violates the Free Exercise clause. But there is nothing in any of this Court's opinions, let alone *Sherbert*, to indicate that such a test would lead to a different result. In *Sherbert* this Court held simply "that South Carolina may not constitutionally apply the [unemployment compensation] eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." 374 U.S. at 410. Unlike the appellant in *Sherbert*, the petitioners here are not being threatened with a choice between their religious beliefs and government benefits. They are not seeking government benefits in a traditional sense[2] and the Board's

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[2] The purportedly coercive injury of which petitioners complain is the failure of the State to exercise *its* coercive regulatory authority to restrain *others* from taking private action that has the effect of offending petitioners' beliefs. This claim, unlike claims directed to nondiscretionary benefit programs, strikes at the heart of the Executive's traditional prerogatives. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809-10 (1984).

decision and order does not address or coercively implicate petitioners in any direct and objective way.

Petitioners argue that "[i]n this case there exists pressure to modify [their] behavior and to violate [their] beliefs." Petition at 28. They then argue, without explanation, and as if all volcanic land or at least all of the Kilauea east rift zone would be affected by this project, that "[g]eothermal development would destroy Native Hawaiian practitioner access to and use of sacred land which is the sine qua non of Pele religious practice. . . ." *Id.* But petitioners offer no evidence to substantiate any of these offensive effects. There is nothing in the record to show how or why a private project on private land to which they have no right of access, and upon which they have never in the past conducted ceremonies, will cause an "impermissible infringement" under *Sherbert*. Some land will be affected, but only a very small portion of the KMERZ and none of the lands where these petitioners have ever practiced their religion in the past. The approved project proposes to use up to 300 acres, less than three percent of the 9,014 acres in the KMERZ, which is only a portion of Campbell Estate's 27,000 acre parcel along the 25 mile Kilauea east rift on the lower eastern slope of Mauna Loa, a massive volcanic formation rising 13,680 feet above sea level.

What petitioners really complain about is the knowledge that this project exists. Redressing this "injury" would require a novel extension of the Free Exercise Clause, and would mean that any person's honest conviction, standing alone, would be sufficient to require the state to show a compelling governmental interest to justify

what are, in essence, zoning decisions. This has never been the law. As Judge Learned Hand wisely stated, and as this Court has on many occasions agreed:

> The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their own conduct to his religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life.

Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953), *quoted in part, Estate of Thorton v. Caldor, Inc.* 472 U.S. 703, 710 (1985).

Petitioners argue *Sherbert, supra,* provides the standard that the Supreme Court of Hawaii should have but did not follow and that under *Sherbert* one need not establish the degree and severity of the burden as a precondition to requiring the state to show a compelling need. But in *Sherbert* the loss was very measurable: appellants there were forced to work on a holy day or lose weekly unemployment benefits. Likewise, in *Yoder,* the State of Wisconsin sought to compel Amish children to attend a school system whose teachings were inconsistent with the entire Amish way of life. *Cf. Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 487 n.22 (1982) (burdens that must be shown even to invoke Article III standing under the Establishment Clause). Because neither the Board nor the Hawaii court below could discover any coercive burden, it is clear even under petitioners' proposed test that the lower court was correct.

The ultimate answer to Petitioners' claim is set forth in the majority opinion in *Bowen v. Roy,* 106 S. Ct. 2147,

2152 (1986). If it is true that a "sincere religious objection" to the use of a Social Security number cannot force the government to provide compelling justification for its use of this proprietary device, so, too, it cannot be that the State of Hawaii need provide "compelling" reasons for permitting geothermal development on private land even if the underlying steam belongs to the State, and, as we concede, even if petitioners truly believe that geothermal development will desecrate some of the manifestations of the Pele religion. *See id.; see also* 106 S. Ct. at 2159 (Blackmun, J., concurring in part); *id.* at 2165 (O'Connor, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part). Indeed, the Board took numerous affirmative steps, and established a variety of conditions in its decision and order, to accommodate petitioners' religious practices.[3] "[B]y virtue of the land exchange, the proposed development site will be an additional 5 to 10 miles away from Moku'a'weoweo and Halema'uma'u where tradition suggests Pele to reside." 740 P.2d at 33, Pet. App. 23. To say that, despite these accommodations, the Board and the Court below violated this Court's interpretation of the Free Exercise Clause would defy any plausible reading of this Court's precedents.[4]

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[3] Petitioners do not reprint the extensive portions of the Board's decision and order of April 11, 1986, which require, among other things, extensive archeological surveys before any ground activity is established in the KMERZ. *See* Decision and Order, CDUA-HA 12/20/85-1830 at 1-25, *reprinted in* 17 Record on Appeal, No. 11334 (Haw. record docketed June 27, 1986). Reference to these required studies is made at Pet. App. 59.

[4] To the extent *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688 (9th Cir. 1986), *cert. granted,*

(Continued on following page)

II. There is No Conflict between the Decision Below and Those of the Lower Courts, Including the Ninth Circuit's Decision in Northwest Indian Cemetery Protective Association v. Peterson, 795 F.2d 688 (9th Cir. 1986), cert. granted, 107 S. Ct. 1971 (U.S. May 4, 1987).

Apparently relying on this Court's Rule 17.1(b), petitioners seek to establish the basis for review upon a perceived conflict with the Ninth Circuit's decision in *Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688 (1986), *cert. granted*, 107 S. Ct. 1971 (U.S. May 4, 1987). There is no such conflict.[5] The *Northwest Indian Cemetery* case, currently before this Court *sub nom. Lyng v. Northwest Indian Cemetery Protective Association*, No. 86-1013, differs from the decision below in important ways, and presents no sound reason to grant the writ here.

In *Northwest Indian Cemetery*, the United States Forest Service sought to construct a replacement logging road

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(Continued from previous page)

107 S. Ct. 1971 (U.S. May 4, 1987), is to the contrary, it is clearly inconsistent with *Bowen*. Even if the Court would disagree with this characterization, however, *Northwest Indian* is wholly distinguishable from the instant case and any conflict between the Ninth Circuit's expansive view and that of the Supreme Court of Hawaii is more apparent than real. *See infra* pp. 12-15.

[5] Petitioners correctly recognize there is no conflict with any other decision of the lower courts. *See Dedman*, 740 P.2d at 33, Pet. App. 24-25 (citing *Inupiat Community of Arctic Slope v. United States*, 548 F Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984) (per curiam), *cert. denied*, 106 S. Ct. 68 (1985); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.) (per curiam), *cert. denied*, 464 U.S. 977 (1983)); Petition at 47 n.19 (citing *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980)).

on government land. 795 F.2d at 689. In this case, the State of Hawaii acting pursuant to its police powers considered and granted a zoning application by a private landowner to engage in a private project to develop geothermal energy underlying its surface estate. Unlike the public land in *Lyng*, access onto the land here involves the rights of the private landowner. Even the Ninth Circuit, we are confident, would be seriously troubled by Free Exercise claims that, if granted, would compel private landowners to yield up what, presumptively, are rights to use and enjoyment that are not restricted by Hawaii's unique land law, *see, e.g., Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982); Haw. Rev. Stat. § 7-1 (1985), or by valid exercises of the state's zoning or proprietary powers, *see, e.g., Dedman*, 740 P.2d at 31, Pet. App. at 12.

Moreover, in *Northwest Indian Cemetery*, the lower court found a well established and well documented history of actual use of the Chimney Rock section of the "high country" in issue. 795 F.2d at 692 & n.6, 693. The "Theodoratus Report" indicated that that particular land had in fact been used for generations for Native American religious practices. *Id.* In the present case, "it is uncontested that '[n]either of the [Petitioners] nor any of the witnesses ever conducted or participated in religious ceremonies on this land.' " *Dedman*, 740 P.2d at 33; Pet. App. A at 21.

Third, in *Northwest Indian Cemetery*, the lower court found that the "road building and logging operations would greatly impair religious exercises of the plaintiff Indians in the only place where they can be performed." 795 F.2d at 693. In this case, petitioners have practiced their religion in many places, but never on this land. The property that is the subject of the instant development permit simply

could not be indispensible in the same manner that the respondents in *Northwest* are claiming in the proceeding now before this Court. *See Dedman,* 740 P.2d at 33, Pet. App. at 23. Unlike *Northwest Indian Cemetery,* there is no specific religious practice associated with the particular geothermal resource underlying *this* land.

Finally, in *Northwest Indian Cemetery,* the Native American practioners identify specific geographic boundaries of the Blue Creek Unit in the high country, and thus provide some reasonable basis for limiting their claim. 795 F.2d at 691-693. In this case petitioners describe Pele's home as the entire area of active volcanism from the top of Mauna Loa through the Ka'u and Puna districts to the sea including the entire area of the Kilauea Volcano and the East and Southwest Rift Zones—in short, the entire eastern portion of the Big Island of Hawaii. Pet. App. at 53-54. This vast tract includes towns, residential and agricultural subdivisions, a military camp, existing geothermal wells, and a producing geothermal power plant that presently generates more than two megawatts of electricity. Pet. App. 57. Petitioners' virtually limitless claim,[6] which, if granted, would preclude geothermal energy development *anywhere* in the Fiftieth State, would constitute such an extraordinary interference with state land use authority

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[6] Characterizing petitioners' claims as limitless is simply another way of saying that, to make the analogy to *Northwest Indian Cemetery* work, petitioners must take this case far beyond the record presented. As this Court pointed out in *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842 (1984), "this Court reviews judgments, not opinions." "It is our duty to look beyond broad sweep of language and determine for ourselves precisely the ground upon which the [lower court] judgment rests." *Black v. Cutter Labratories,* 351 U.S. 292, 298 (1956). *See generally* this Court's Rule 17.1(b).

that not even the Ninth Circuit would countenance it. As this Court so recently reminded the lower courts, the Free Exercise Clause is not written " 'in terms of what the individual can extract from the government.' " *Bowen v. Roy,* 106 S. Ct. at 2152 (quoting *Sherbert v. Verner,* 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Not even the expansive ruling in *Northwest Indian Cemetery* would sanction the broad nullification of government prerogative that the petitioners demand.

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CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX A

Hawaii Revised Statutes (1985)

§ 205-5.1 *Geothermal resource subzones.* (a) Geothermal resource subzones may be designated within the urban, rural, agricultural, and conservation land use districts established under section 205-2. Only those areas designated as geothermal resource subzones may be utilized for geothermal development activities in addition to those uses permitted in each land use district under this chapter. Geothermal development activities may be permitted within urban, rural, agricultural, and conservation land use districts in accordance with this chapter. "Geothermal development activities" means the exploration, development, or production of electrical energy from geothermal resources.

(b) The board of land and natural resources shall have the responsibility for designating areas as geothermal resource subzones as provided under section 205-5.2; except that the total area within an agricultural district which is the subject of a geothermal mining lease approved by the board of land and natural resources, any part or all of which area is the subject of a special use permit issued by the county for geothermal development activities, on or before May 25, 1984, is hereby designated as a geothermal subzone for the duration of the lease. The designation of geothermal resource subzones shall be governed exclusively by this section and section 205-5.2, except as provided therein. The board shall adopt, amend, or repeal rules related to its authority to designate and regulate the use of geothermal resource subzones in the manner provided under chapter 91.

The authority of the board to designate geothermal resource subzones shall be an exception to those provisions of this chapter and of section 46-4 authorizing the land use commission and the counties to establish and modify land use districts and to regulate uses therein. The provisions of this section shall not abrogate nor supersede the provisions of chapters 182 and 183.

(c) The use of an area for geothermal development activities within a geothermal resource subzone shall be governed by the board within the conservation district and, except as herein provided, by state and county statutes, ordinances, and rules not inconsistent herewith within agricultural, rural, and urban districts, except that no land use commission approval or special use permit procedures under section 205-6 shall be required for the use of such subzones. In the absence of provisions in the county general plan and zoning ordinances specifically relating to the use and location of geothermal development activities in an agricultural, rural, or urban district, the appropriate county authority may issue a geothermal resource permit to allow geothermal development activities. "Appropriate county authority" means the county planning commission unless some other agency or body is designated by ordinance of the county council. Such uses as are permitted by county general plan and zoning ordinances, by the appropriate county authority, shall be deemed to be reasonable and to promote the effectiveness and objectives of this chapter. Chapters 177, 178, 182, 183, 205A, 226, 342, and 343 shall apply as appropriate. If provisions in the county general plan and zoning ordinances specifically relate to the use and location of geothermal development activities in an agricultural, rural, or urban district, the provisions shall require the appropriate county authority to conduct a public hearing and, upon appropriate request, a contested case hearing pursuant to chapter 91, on any application for a geothermal resource permit to determine whether the use is in conformity with the criteria specified in subsection (e) for granting geothermal resource permits.

(d) If geothermal development activities are proposed within a conservation district, then, after receipt of a properly filed and completed application, the board of land and natural resources shall conduct a public hearing and, upon appropriate request, a contested case hearing pursuant to chapter 91 to determine whether, pursuant to board regulations, a conservation district use permit shall

be granted to authorize the geothermal development activities described in the application.

[§ 205-5.2] *Designation of areas as geothermal resource subzones.* (a) Beginning in 1983, the board of land and natural resources shall conduct a county-by-county assessment of areas with geothermal potential for the purpose of designating geothermal resource subzones. This assessment shall be revised or updated at the discretion of the board, but at least once each five years beginning in 1988. Any property owner or person with an interest in real property wishing to have an area designated as a geothermal resource subzone may submit a petition for a geothermal resource subzone designation in the form and manner established by rules and regulations adopted by the board. An environmental impact statement as defined under chapter 343 shall not be required for the assessment of areas under this section.

(b) The board's assessment of each potential geothermal resource subzone area shall examine factors to include, but not be limited to:

(1) The area's potential for the production of geothermal energy;

(2) The prospects for the utilization of geothermal energy in the area;

(3) The geological hazards that potential geothermal projects would encounter;

(4) Social and environmental impacts;

(5) The compatability of geothermal development and potential related industries with present uses of surrounding land and those uses permitted under the general plan or land use policies of the county in which the area is located;

(6) The potential economic benefits to be derived from geothermal development and potential related industries; and

(7) The compatability of geothermal development and potential related industries with the uses permitted under sections 183-41 and 205-2, where the area falls within a conservation district.

In addition, the board shall consider, if applicable, objectives, policies and guidelines set forth in part I of chapter 205A, and the provisions of chapter 226.

(c) Methods of assessing the factors in subsection (b) shall be left to the discretion of the board and may be based on currently available public information.

(d) After the board has completed a county-by-county assessment of all areas with geothermal potential or after any subsequent update or review, the board shall compare all areas showing geothermal potential within each county, and shall propose areas for potential designation as geothermal resource subzones based upon a preliminary finding that the areas are those sites which best demonstrate an acceptable balance between the factors set forth in subsection (b). Once such a proposal is made, the board shall conduct public hearings pursuant to this subsection, notwithstanding any contrary provision related to public hearing procedures.

(1) Hearings shall be held at locations which are in close proximity to those areas proposed for designation. A public notice of hearing, including a description of the proposed areas, an invitation for public comment, and a statement of the date, time, and place where persons may be heard shall be published and mailed no less than twenty days before the hearing. The notice shall be published on three separate days in a newspaper of general circulation statewide and in the county in which the hearing is to be held. Copies of the notice shall be mailed to the department of planning and economic development, and the planning commission and planning department of the county in which the proposed areas are located.

(2) The hearing shall be held before the board, and the authority to conduct hearings shall not be delegated to any agent or representative of the board. All persons and agencies shall be afforded the opportunity to submit data, views, and arguments either orally or in writing. The department of planning and economic development and the county planning department shall be permitted to appear at every hearing and make recommendations concerning each proposal by the board.

(3) At the close of the hearing, the board may designate areas as geothermal resource subzones or announce the date on which it will render its decision. The board may designate areas as geothermal resource subzones only upon finding that the areas are those sites which best demonstrate an acceptable balance between the factors set forth in subsection (b). Upon request, the board shall issue a concise statement of its findings and the principal reasons for its decision to designate a particular area.

(e) The designation of any geothermal resource subzone may be withdrawn by the board of land and natural resources after proceedings conducted pursuant to the provisions of chapter 91. The board shall withdraw a designation only upon finding by a preponderance of the evidence that the area is no longer suited for designation; provided that the designation shall not be withdrawn for areas in which active exploration, development, production or distribution of electrical energy from geothermal sources is taking place.

(f) This Act shall not apply to any active exploration, development or production of electrical energy from geothermal sources taking place on June 14, 1983, provided that any expansion of such activities shall be carried out in compliance with its provisions.

Supreme Court, U.S.
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No. 87-605

In The

Supreme Court of the United States

October Term, 1987

RALPH PALIKAPU O KAMOHOALI'I DEDMAN and
DR. NOA EMMETT AUWAE ALULI,

Petitioners,

vs.

HAWAII BOARD OF LAND AND NATURAL RESOURCES,
ESTATE OF JAMES CAMPBELL and
TRUE/MID-PACIFIC GEOTHERMAL VENTURES,

Respondents.

BRIEF OF RESPONDENTS, ESTATE OF JAMES CAMPBELL AND TRUE/MID-PACIFIC GEOTHERMAL VENTURE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE DECISION OF THE HAWAII SUPREME COURT CONFLICTS WITH ANY DECISION OF THIS COURT TO WARRANT FURTHER REVIEW?

II. WHETHER ISSUES PENDING BEFORE THIS COURT IN *LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION* ARISE FROM SUBSTANTIALLY IDENTICAL FACTS TO THE INSTANT CASE TO WARRANT REVIEW?

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BRIEF OF RESPONDENTS, ESTATE OF JAMES CAMPBELL AND TRUE/MID-PACIFIC GEOTHERMAL VENTURE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

I. Nature of The Case

This case arises from the Respondent Estate of James Campbell and the True/Mid-Pacific Geothermal Venture's (hereinafter collectively referred to as "Campbell") filing of a Conservation District Use Application (hereinafter referred to as "CDUA") to explore and develop geothermal resources located on lands owned by Campbell in the Kilauea area, Island of Hawaii, State of Hawaii. The Hawaii Supreme Court's decision, which is the subject of Petitioners' writ, is the culmination of numerous public hearings and four evidentiary contested case hearings

which span a period in excess of four years, in addition to a detailed and lengthy briefing process before the Hawaii Supreme Court.

A thorough review of the record created during the extensive evidentiary hearing process reveals a glaring absence of facts which establish that Petitioners or their witnesses conducted or participated in religious ceremonies on the property in question or identified the existence of any religious sites located on the land area in question. *See* Pet. App. pp. 21, 59. The absence of this evidence was noted by the Board of Land and Natural Resources, State of Hawaii (hereinafter referred to as "BLNR") and the Hawaii Supreme Court. Despite this fact, Petitioners have made numerous contentions in their petition for writ of certiorari that there are sacred sites or areas where religious practices occur within the region designated for geothermal exploration and development. As noted by the Hawaii Supreme Court, "the BLNR's action does not compel them, by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds." Pet. App. p. 20. As such, "there is simply no showing of the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." Pet. App. p. 21.

II. Statement of Facts

On March 2, 1982, Campbell filed an application for a CDUA with the BLNR to develop geothermal resources at Kahauale'a, Puna, Hawaii. Campbell also filed a draft Environmental Impact Statement for the project at Kahauale'a. With the BLNR acting in a quasi-judicial ca-

pacity, hearings were held over 14 days, usually running from 9:00 a.m. through 10:00 p.m. daily. On February 25, 1983, the BLNR issued detailed Findings of Facts, Conclusions of Law and a Decision and Order granting Campbell limted exploration rights within an 800 acre area located at Kahauale'a. Pet. App. pp. 8-9. None of the Petitioners were parties to this first contested case and no party objected to the proposed project on religious grounds.

Following the BLNR's Decision in the first contested case hearing on February 25, 1983, the Hawaii State Legislature during the 1983 Legislative Session passed Act 296 (Section 205-5.1 and 5.2, HRS) which implemented a two-tier planning process designed to ensure the prudent development of geothermal energy as an alternate energy source for the State of Hawaii. Under Act 296, the BLNR was delegated the authority to designate certain land areas in the State as geothermal resource subzones if the criteria set forth in the Act were met. Under Act 296, geothermal development, as defined therein, would only occur in areas designated as geothermal resource subzones. No actual development, however, could occur until the second tier of the geothermal planning process is completed. The second tier involves the filing of a permit with either the BLNR (conservation land) or the County (urban, agricultural or rural land) requesting the right to develop a specific geothermal project within a geothermal resource subzone.

As a result of Act 296, a second contested case hearing was held to determine whether the Kahauale'a area was appropriate for designation as a geothermal resource subzone. Again the BLNR sat in its quasi-judicial ca-

pacity and heard testimony over a period of nine days with hearings running from 9:00 a.m. to 10:00 p.m. daily. The BLNR issued its Decision and Order on December 28, 1984 designating 800 acres in Kahauale'a as a geothermal resource subzone. The Decision and Order, among other things, also requested that Campbell investigate and consider a land exchange involving State owned lands in the Kilauea Middle East Rift Zone (hereinafter referred to as "KMERZ") and the Kahauale'a lands which is situated adjacent to Hawaii Volcanoes National Park. This land exchange was originally suggested by opponents of the geothermal project since a land exchange would relocate the project a greater distance away from the National Park and the active volcanic rift area.

After the decision of December 28, 1984, public hearings and a third contested case hearing were held on the designation of KMERZ as a geothermal resource subzone. The hearings were held over three days with the BLNR issuing its decision on December 20, 1985, designating approximately 9,014 acres of State exchanged lands in the KMERZ as a geothermal resource subzone. On April 9, 1986 the BLNR issued Findings of Fact and Conclusions of Law in support of its Decision and Order. On December 27, 1985, the State and Campbell exchanged deeds, the State receiving the Kahauale'a lands and the Estate of James Campbell receiving a portion of the KMERZ area.

The BLNR accepted Campbell's application for a CDUA on January 3, 1986. A public hearing on the application was heard on January 13, 1986 at which time a fourth contested case hearing was requested. The fourth

contested case hearing was held over a period of nine days with the BLNR issuing its Decision and Order on April 11, 1986, which was later amended by the issuing of detailed Findings of Fact and Conclusions of Law which were filed on June 18, 1986. The June 18, 1986 Decision permits Campbell to explore, develop and produce up to 25 megawatts of geothermal energy and allows Campbell to explore for the future development of an additional 75 megawatts, all subject to conditions on archaeological sites, air, water, land, noise, and light pollution monitoring.

Petitioners, as Appellants below, subsequently filed Notices of Appeals for both the third and fourth contested case hearings. Lengthy Briefs on the appeals were filed by the parties. On July 14, 1987, the Supreme Court of the State of Hawaii rendered its opinion affirming the decision of the BLNR.

Throughout this lengthy zoning and permitting process, a great deal of information was provided to the BLNR which in turn was incorporated in its decision. Petitioners, in their application for writ of certiorari, submit certain facts as being uncontroverted. A closer examination of the record before the Hawaii Supreme Court and before the BLNR shows that the facts put forth by the Petitioners as uncontroverted are deceiving as they reflect only portions of the record and give this Court the impression that specific religious acts were conducted within the KMERZ area and that there are religious sites located on the property. To clarify the record regarding religious practices and the evidence presented, the following facts should be known to this Court:

1. That the Pele religion is only one portion of native Hawaiian religion. According to traditional Hawaiian

religion, there are four major gods: Ku, Kane, Lono and Kanaloa. The responsibility of volcanism rests with the God, Ku. Pet. App. pp. 52-53.

2. That although Petitioners consider any activity impermissible within the area considered to be Pele's abode, the BLNR noted that there were existing man-made structures including pre-existing geothermal wells throughout the region in question. Further, the belief that geothermal exploration and development will cause desecration of Pele is not a view universally held by all Hawaiians. In fact, some Hawaiians believe that the development of geothermal energy is not counter productive to native Hawaiian culture and heritage. Pet. App. p. 57.

3. That nowhere in the record is it reflected that any kumu hula (one who trains others in the tradition of hula) received "power" at sites within in the KMERZ. In fact, as stated by both the BLNR and the Hawaii Supreme Court, "neither of the parties making religious claims nor any of the witnesses testified that they've ever conducted or participated in religious ceremonies on this land." Pet. App. p. 21.

4. In their Petition on page 15, Petitioners state that there is a message from Pele concerning her opposition to geothermal development. This chant is taken out of context as the specific site referred to in this chant is Halema'uma'u which is located approximately 5-10 miles from the KMERZ. It is significant that the BLNR decision notes that by virtue of the land exchange, the proposed development site will be at least five to ten miles away from Moku'a'weoweo and Halema'uma'u where tradition suggests Pele to reside. Pet. App. pp. 56-57. Thus, the site discussed in the chant is not located in the KMERZ area.

In summary, it is important for this Court to recognize that the beliefs of the Petitioners are not universally held by all native Hawaiians, and that the Petitioners did

not submit any evidence regarding any religious activities or religious sites contained within the KMERZ geothermal resource subzone. As such, the granting of rights to Campbell to explore and develop geothermal resources does not, in any manner, burden the religious rights of the Petitioners.

REASONS AND ARGUMENTS FOR DENYING THE WRIT

I. THE DECISION OF THE HAWAII SUPREME COURT IS CORRECT AND CONSISTENT WITH OTHER FREE EXERCISE DECISIONS OF THIS COURT. NO FURTHER REVIEW IS WARRANTED.

Petitioners herein contend that the Hawaii Supreme Court's unanimous affirmance of the BLNR's decision impermissibly burdens the free exercise rights of practitioners of the Pele religion. In determining whether or not an unconstitutional infringment upon the Pele religion exists, the Hawaii Supreme Court applied the following traditional test:

> . . . it [is] necessary to examine whether or not the activity interferred with by the State was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and whether or not the State had a compelling interest in the regulation which justified such a burden.

Dedman v. Board of Land and Natural Resources, 740 P. 2d 28, 32 (1987), Pet. App. p. 16. *Accord, Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403-09 (1962).

Finding that neither the BLNR nor Campbell contested that the Petitioners' beliefs are rooted in a legitimate and sincerely held religious belief, the court below turned its attention to the second issue of whether or not the Petitioners' free exercise rights had been burdened by the BLNR's decision, and the extent or impact of that decision on the Petitioners' religious practices.

In reviewing the Petitioners' claim, the Hawaii Supreme Court had before it an extensive record comprised of volumes of transcripts and reams of evidence elicited from approximately 156 witnesses during various public and contested case hearings held over a total of 35 days. Despite the opportunity to do so, the Petitioners failed to submit evidence and testimony during the numerous hearings which would demonstrate a recognizable burden of a constitutional magnitude upon their free exercise claims. The court below specifically stated:

> . . . it is uncontested that '[n]either of the [Appellants] nor any of the witnesses testified that they ever conducted or participated in religious ceremonies on this land.' And the Board specifically concluded that '[t]here is no indication that tapping this heat source from the earth has diminished or negatively affected the eruptive nature of Kilauea Volcano.' There is simply no showing of 'the kind of objective

> danger to free exercise of religion that the First Amendment was designed to prevent.[1]

Dedman, 740 P.2d at 33, Pet. App. 21, *citing Wisconsin v. Yoder*, 406 U.S. at 218. Finding no burden on the Petitioners' free exercise rights, the court was not required to shift the legal burden to the State to establish a compelling interest.

In reaching this conclusion, the Hawaii Supreme Court had both the legal and factual basis to affirm the BLNR's decision. The court never departed from the traditional free exercise analysis under *Sherbert, supra* and *Wisconsin, supra* as Petitioners allege. The court never inquired into the degree or severity of the burden on the Petitioners' religion, finding instead that they failed to establish *any* burden at all.[2] *See* Pet. Br. pp. 38-41. There was none of the "coercive effect" or "substantial pressure" upon the practitioners to modify their behavior and violate their beliefs. *See Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981).

In their petition for writ of certiorari, Petitioners are now advocating an interpretation of free exercise an-

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[1]In addition to the record, the court was informed that since 1982, two other geothermal projects were already engaging in exploration and development production activities within six miles of the KMERZ area. However, Petitioners never contested those projects. Pet. App. pp. 59-61.

[2]During oral argument before the Hawaii Supreme Court, Associate Justices Frank Padgett, Edward Nakamura and Walter Heen indicated that they could not find any evidence in the court record showing that geothermal development would actively interfere with religious activities. *See* Kobayashi, *High Court Leaning Against Pele Worshippers*, The Honolulu Advertiser, April 23, 1987 at p. A-1, col. 1.

alysis unsupported by any precedent from this Court. Relying on *Thomas, supra*, Petitioners propose that the "honest conviction"[3] of the practitioners *alone* is sufficient to meet the burden prong under the free exercise analysis. *Id.* at 716 Pet. Br. p. 37. However, Petitioners' advocacy of such a subjective *per se* rule ignores the context in which this Court considered Thomas' "honest conviction" when analyzing his free exercise claim. Thomas' "honest conviction" described the sincerity of his belief, not the basis for finding a burden. Rather, this Court focused on Thomas' overt conduct, i.e., terminating his employment and his subsequent denial of unemployment compensation benefits, in order to find a burden on his free exercise rights.[4]

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[3]Petitioners' proposed "honest conviction" test arises from *Thomas v. Review Board of the Indiana Employment Security Division,* 405 U.S. 707 (1981) in which this Court stated:

> The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that the petitioner terminated his work because of an honest conviction that such work was forbidden by his religion. *Id.* at 717.

[4]The free exercise decisions of this Court have all focused upon the objective conduct of the individual when compelled to violate a tenent of his religion or where a benefit or right was made conditional upon his compromising his faith. *See e.g. Hobbie v. Unemployment Appeals Commission of Florida,* 480 U.S. —, 94 L.Ed.2d 190, 107 S.Ct. 1046 (1987) (denial of unemployment benefits violates First Amendment right of follower of Seventh Day Adventist Church when discharged for refusing to work on her Sabbath due to religious convictions adopted after beginning of her employment); *Wooley v. Maynard,* 430 U.S. 705 (1977) (New Hampshire's requirement that all motor vehicles bear the motto "Live Free or Die" violated Jehovah Witnesses' First Amendment rights); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (Wisconsin's compulsory education law requir-

(Continued on following page)

Petitioners' proposal of a "primary effects" test is equally without merit. Petitioners urge this Court to interpret its free exercise precedent as creating a "primary effects" test whereby "government laws and regulations are constitutionally invalid if their *primary effect* is to impermissibly infringe religion." (Emphasis in original). Pet. Br. p. 24. In assessing the primary effect of the governmental action, petitioners rely on *Thomas, supra,* for the objective standard that "when government activity puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists.'" Pet. Br. pp. 27-28. This argument, however, ignores the Hawaii Supreme Court's finding that:

> . . . the Board's action does not compel [the Pele practitioners], by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds.

Dedman, supra, 740 P.2d at 32-33, Pet. App. 19-20. The court below, based on the record before it, clearly found that the BLNR's decision in no way forces the Petitioners to violate their religious beliefs nor does the decision make receipt of a public benefit or right conditional upon renunciation of religious practice. Therefore, the

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(Continued from previous page)

ing attendance beyond the eight grade violated Old Order Amish's free exercise of their religion); *Sherbert v. Verner,* 374 U.S. 398 (1963) (denial of unemployment compensation to Sabbatarian who refused to work on Saturday where the effect was to pressure a worker to abandon her religious convictions); *cf. Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985) (no burden on free exercise rights where statute does not require individuals to act in a manner inconsistent with their religious beliefs).

"primary effects" test as articulated by the Petitioners would still result in a clear finding of no burden. The outcome by the court below remains consistent with this Court's free exercise precedent and no further review is warranted.

II. ISSUES PENDING BEFORE THIS COURT IN LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION, ARE FACTUALLY DISTINGUISHABLE FROM THE INSTANT CASE.

The United States' writ of certiorari to the Ninth Circuit Court of Appeals in *Lyng v. Northwest Indian Cemetery Protection Association, et al.*, No. 86-1013 (October Term 1987) presents legal issues arising from circumstances which are factually distinguishable from the instant case.

The obvious difference is that in *Lyng, supra,* the Indian plaintiffs' *use* of the sacred land for religious purposes was never in dispute. *Northwest Indian Cemetery Protection Association v. Peterson,* 565 F.Supp. 586, 591-92 (N.D. Cal. 1983), *aff'd,* 795 F.2d 688, 692 (9th Cir. 1986). The lower federal court specifically found that "[f]or generations, individual members, spiritual leaders, and medicine persons of the Yurok, Karok, and Tolowa tribes have traveled to the high country to communicate with the 'great creator,' to perform rituals, and to prepare for specific religious and medical ceremonies." 565 F.Supp. at 594.

In contrast, neither the BLNR nor the Hawaii Supreme Court found any evidence that the KMERZ area was ever used in this generation or prior generations for

religious purposes. *Dedman,* 740 P.2d at 33, Pet. App. p. 21. This important factual distinction separates the legal issues before this Court in *Lyng* sufficiently such that no further review is necessary in the instant case.

Moreover, lacking the supporting facts, Petitioners attempt to alter the factual basis upon which the court below rendered its decision in order to create legal issues to parallel those presented in *Lyng.* However, whether or not there has been an infringement of the Petitioners' free exercise right of religion is a factual question. It is a well established rule that this Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnson,* 268 U.S. 220, 227 (1925). Moreover, this Court has often held that " a court of law, such as this court is, rather than a court for correction of errors in fact findings, cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Mfg. Co. v. Linde Air Products Co.,* 337 U.S. 910 (1949). Such error does not exist in this case.

The BLNR, acting in a quasi-judicial capacity, painstakingly reviewed the evidence and testimony in arriving at its Findings of Fact and Conclusions of Law, concluding that there was no burden on the Petitioners' free exercise claims. In turn, the Hawaii Supreme Court, applying a traditional free exercise analysis similarly found no burden and affirmed the BLNR's decision. However, contrary to Petitioners' contentions, the Hawaii Supreme Court never "found evidence that Native Hawaiians sincerely believed that geothermal development would desecrate the body of Pele, destroy Pele by robbing her of

vital heat, interfere with ritual practices, and disable practitoners from training young Hawaiians." Pet. Br. pp. 22-23. Rather, the court was reiterating the Petitioners' assertions and claims of the existence of a burden. *Dedman*, 740 P.2d at 32. Pet. App. p. 18.

Campbell objects to Petitioners' inaccurate statements of the factual basis upon which the Hawaii Supreme Court arrived at its decision and Petitioners attempt, therefore, to create legal issues by misstating essential facts of objective religious conduct to align this case with *Lyng* and bring them within this Courts free exercise decisions.

Finally, to the extent that the geothermal resource in this case is publicly owned, factual similarities with *Lyng* end. The surface area for the geothermal project is privately owned by Campbell. Therefore, Petitioners' request for governmental proscription against any development on private land on religious grounds certainly runs afoul of the Establishment Clause.[5]

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[5]Recognizing that any prohibition against Campbell developing the land in any way in furtherance of Petitioners' belief would necessarily implicate the Establishment Clause, the Hawaii Supreme Court stated:

> The free exercise clause of the state and federal constitution are "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." [citation omitted]. "[T]he free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out." [citations omitted].

Dedman 740 P.2d at 33-34. Pet. App. pp. 24-25.

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CONCLUSION

Petitioners have failed to show that the Hawaii Supreme Court decision in this above-entitled motion is in conflict with opinions of this Court. In addition, Petitioners have not shown that the issues raised by this case are sufficiently important for this Court to exercise its extraordinary jurisdiction. For the foregoing reasons, Respondents request this Court to deny Petitioners' request for certiorari.

Respectfully submitted,

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APPENDIX A

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HIGH COURT LEANING AGAINST PELE WORSHIPPERS

By Ken Kobayashi
Advertiser Courts Writer

A majority of Hawaii Supreme Court justices indicated yesterday they aren't conviced the state's approval of a Big Island geothermal power project violates the constitutional rights of native Hawaiians to worship the volcano goddess Pele.

The high court has yet to rule on the issue, but during a court hearing, three of the five justices expressed doubts about the constitutional claims.

The three indicated the native Hawaiians must show that the project actually hampers their activities in worshipping Pele.

Otherwise, Associate Justice Edward Nakamura said, halting the project simply because it violates their beliefs would mean the state was unconstitutionally endorsing their religion.

The case is believed to be the first requiring the high court to consider native Hawaiian religious rights based on the worship of the Hawaiian deity.

The challenge to the project was filed by Dr. Noa Emmett Auwae Aluli and Ralph Palikapu O Kamohoali'i Dedman. They were represented by attorney Yuklin Aluli of the Pele Defense Fund and Steven Moore, a Colorado lawyer with the Native American Rights Fund.

The two plaintiffs are contesting decisions by the state Board of Land and Natural Resources last year that allow geothermal exploration and development of the project on 9,000 acres of Campbell State land at Kilauea middle-east rift zone.

The project, attorney Yuklin Aluli argued is "a desecration of the home and the physical manifestation (the steam)" of Pele.

Moore said the court will be "advancing the destruction" of the religion by permitting the project to move forward.

However, three justices indicated they couldn't find any evidence in the court record showing the geothermal development would actually interfere with religious activities.

Associate Justice Frank Padgett called the case "unique" because in other court decisions dealing with violations of religious freedom, the government either forces or forbids the believer to act.

"In this case, (there is) neither one," he said.

Walter Heen, a part-Hawaiian judge from the state appeals court sitting in for Associate Justice James Wakatsuki, questioned how the native Hawaiians could conclude their practice is hampered because they believe the prospect will desecrate Pele.

"How is this a burden on the right to practice this religion?" he asked.

He called that aspect of the constitutional claims "bothersome."

Attorney Aluli argued that the project's "interference" with one's belief is enough to make it unconstitutional.

But Nakamura replied the state would then be violating the First Amendment by helping to establish a religion if it acted on that basis.

Also on the high court are Chief Justice Herman Lum and Associate Justice Yoshiml Hayashi.

Campbell Estate's attorney, Benjamin Matsubara, later said the estate will wait for the high court's ruling before proceeding with the $40 million project, designed to generate at least 25 megawatts of energy.

If the high court upholds the land board's decisions, he said he hopes drilling will start within three months of the ruling.

But Dr. Aluli said Pele will have the "last say, She's already wiped out Kahaulea, (an earlier proposed site about six miles away, destroyed by 1983-1984 volcanic eruptions)."